Appl — 19-6402 Judge Davy

Evans & Davis

Affirmed — Judge Miller

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 304.

THE GREAT WESTERN INSURANCE COMPANY

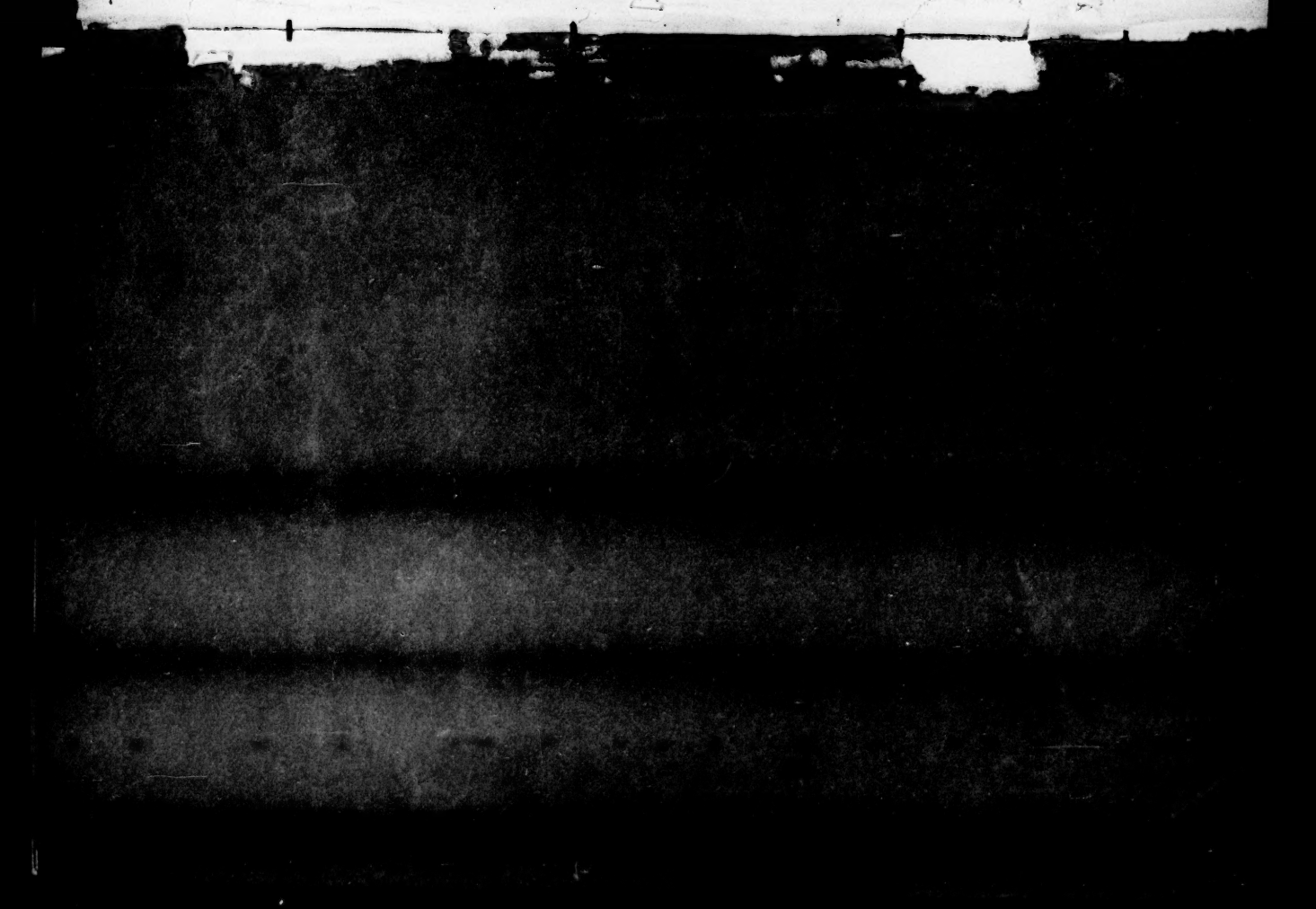
vs.

JAMES FOGARTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

FILED DECEMBER 2, 1872.

Oct. D. 1873



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1 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the circuit court of the United States for the southern district of New York, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court before you, or some of you, between James Fogarty, plaintiff, and The Great Western Insurance Company, defendant, a manifest error hath happened, to the great damage of the said The Great Western Insurance Company, as is said, and as appears by its complaint: We, being willing that such error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the justices of the Supreme Court of the United States, at the capital, in the city of Washington, together with this writ, so that you have the same at the said place, before the justices aforesaid, on the first Monday of December next, that, the record and proceedings aforesaid being inspected, the said justices of the Supreme Court may cause further to be done therein to correct that error what of right, and according to the law and custom of the United States, ought to be done.

Witness the honorable Salmon P. Chase, Chief Justice of the Supreme Court of the United States, this fourth day of October, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL.] KENNETH G. WHITE,
Clerk of the Circuit Court of the United States of America for the Southern District of New York, in the Second Circuit.

2 (Indorsed:) U. S. Supreme Court. The Great Western Insurance Company, plaintiff in error, against James Fogarty, defendant in error. Writ of error. Evarts, Southmayd & Choate, attorneys for plaintiff in error.

I hereby allow the within writ.
New York, Oct. 3d, 1872.

SAM'L BLATCHFORD, *Judge.*

Filed Oct. 4, 1872.

UNITED STATES OF AMERICA,
Southern Dist. of New York, ss:

I, Kenneth G. White, clerk of the circuit court of the United States of America for the southern district of New York, in the second circuit, by virtue of the foregoing writ of error, and in obedience thereto, do hereby certify that the foregoing pages, numbered from one to 116, inclusive, contain a true and complete transcript of the record and proceedings had in said court in the case of The Great Western Insurance Company, plaintiff in error, ag't James Fogarty, defendant in error, as the same remain of record and on file in said office.

In testimony whereof I have caused the seal of the said court to be hereunto affixed at the city of New York, in the southern dist. of New York, in the second circuit, this 29th day of November, in the year of our Lord one thousand eight hundred and seventy-two, and of the Independence of the said United States the ninety-seventh.

[SEAL.] KENNETH G. WHITE, *Clerk.*

3 U. S. circuit court for the southern district of New York, second circuit.

Pleas before the justices of the circuit court of the United States of America for the southern district of New York, in the second circuit, at the city of New York, as yet of October term, in the year one thousand eight hundred and sixty-eight.

Witness Hon, Lewis B. Woodruff, justice.

KENNETH G. WHITE, *Clerk.*

Be it remembered that, heretofore, and on the twentieth day of October *of October* term, in the year one thousand eight hundred and sixty-eight, before the justices of the circuit court of the United States for the southern district of New York, at the city of New York, comes James Fogarty, by Owen, Nash and Gray, his attorneys, and brings into the said court, before the aforesaid justices thereof, their certain declaration against The Great Western Marine Insurance Company, in the words & figures following, that is to say:

4

5 SOUTHERN DISTRICT OF NEW YORK, *ss:*

The Great Western Marine Insurance Company were summoned to answer James Fogarty, plaintiff herein, of a plea of trespass on the case upon premises; and thereupon the said plaintiff, by Owen, Nash & Gray, his attorneys, complain of the Great Western Marine Insurance Company, the defendants herein, for that whereas the said plaintiff, before and at the several times hereinafter mentioned, was, and still is, a citizen of Spain, residing at Havana, and that the defendants were, at the said times, and still are, a corporation created by or under the laws of the State of New York.

And, also, for that whereas the said defendants, heretofore, to wit, on the 7th day of March, 1862, at New York, to wit, in the southern district aforesaid, made a certain policy of insurance, commonly called an open policy, and whereby, in consideration of a premium or award of two hundred dollars, the defendants insured F. C. Yzquirdo, on account of whom it may concern, loss, if any, to be paid to him, lost or not lost, and from ports and places to ports and places, and to cover such risks as might be approved and endorsed thereon, upon all kinds of

6 lawful goods and merchandizes laden or to be laden on board the good vessel or vessels, whereof was master for that voyage, or whoever else should go for master in the said vessel, or by whatever other name or names the said vessel or the master thereof should be named or called; that the adventure upon the said goods and merchandizes should begin from and immediately following the loading thereof on board of the said vessel at, as aforesaid, and so should continue and endure until the said goods and merchandizes should be safely landed at, as aforesaid; and that it should and might be lawful for the said vessel, in her voyage, to proceed and sail, to touch and stay at any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to such insurance; and the said goods and merchandizes so insured were valued at the invoice price thereof, with ten per cent. additional, unless otherwise agreed upon.

That touching the adventures and perils which the defendants were contented to bear and take upon themselves on the voyage, they were

of the seas, winds, waves, rocks, sands, shoals, and coasts, collisions, and sinking at sea, fires, jettisons, loss by pirates, rovers, or assailing thieves, barratry of the master and mariners, and all
7 other losses and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandizes, or any part thereof, occasioned by sea perils, subject, however, to such clauses, terms, and rates of average as were contained in the printed tariff of the defendants, and in the memorandum of the policy, unless otherwise agreed upon in writing; that in case of any loss or misfortune it should be lawful and necessary to and for the assured, their factors, servants, and assigns to sue, labor, and travel for, in and about the defence, safeguard and recovery of the said goods and merchandizes, or in any part thereof, without prejudice to such insurance, and the acts of the insured or insurers in recovering, saving, and preserving the property insured in case of disaster should not be considered a waiver or an acceptance of an abandonment to the charges whereof the said defendants would contribute according to the rate and quantity of the sum therein insured, the consideration of such insurance having been paid by the assured or assigns at and after the nominal rate of two and one half per cent., the premium in each risk to be fixed at the time of endorsement, with additions and deductions to conform to the rates of the company when the
8 character of the vessel and time of sailing should be known; that in case of loss, such loss should be paid in thirty days after proof of loss and proof of interest, (the amount of any note or notes given the company for premium, if unpaid, and all other indebtedness being first deducted,) but no partial loss or particular average should in any case be paid, unless amounting to five per cent: Provided always, and it was thereby further agreed, that if the said assured should have made any other assurance upon the premises aforesaid prior in date to this policy, then the said defendants should be answerable only for so much as the amount of the said prior assurance might be deficient towards fully covering the premises thereby insured, and the defendants should return the premium upon so much of the sum by them assured as they should be by such prior assurance exonerated from; and that in case of any insurance upon the said premises subsequent in date to this policy, the defendants should, nevertheless, be answerable for the full extent of the sum by them subscribed thereto, without right to claim contribution from such subsequent assurers, and should be accordingly entitled to retain the premium by them received in the same manner as if no subsequent assurance had been made.

9 And it was in and by the said policy further agreed that the property should be warranted by the assured free from any charge, damage, or loss which might arise in consequence of a seizure or detention for or on account of any illicit or prohibited trade, or any trade in articles contraband of war, with a warranty by the assured not to abandon in case of blockade, and free from any loss or expense arising from capture, seizure, detention, or blockade, or any attempt, threat, or any of the consequences of the hostilities of nations, notwithstanding anything to the contrary in such policy, but in the event of blockade, to be at liberty to proceed to an open port, and there end the voyage; warranted by the assured free from damage, or injury from dampness, change of flavor, or being spotty, discolored, musty or mouldy, except caused by actual contact of sea water with the article damaged, occasioned by sea perils; that in case of partial loss by sea damage to dry-goods, cutlery, or other hardware, the loss should be ascertained by a seperation and sale of the portion only of the contents of the packages

so damaged and not otherwise, and that the same practice should obtain as to all other merchandize as far as practicable, and not to be
10 liable for stains or damages to the casks or other packages containing liquors or wet goods of any kind, nor for leakage on molasses or other liquids, unless occasioned by stranding or collision with another vessel, and not to be liable for general average in consequence of loss on ice cargo. That in case of claims for damages on dry-goods or hardware exceeding fifteen per cent. the company should have the privelege of settling upon the principle of a salvage loss, paying to the assured the sum insured with the freight and duties paid thereon.

It was also agreed that on risks hence to California the property insured should be discharged within thirty days after the arrival of the vessel, otherwise the risk under such policy should cease; that endorsements should be valued at the sums insured, provided they did not vary from the cost more than twenty per cent., and that in case of particular average or damage, the sound value at the port of destination was not to exceed the insured value with the freight added thereto; that in case of claims for damage, the examinations at San Francisco should be made under the direction of the agent of the company; that no outward shipment from the United States, or coastwise or inland
11 within the same, should be considered as insured under an open policy until approved and endorsed by such company, unless otherwise agreed upon in writing that endorsement should be valued at the same: Provided, however, that in coastwise or inland shipments within the United States they should not vary from the cost more than ten per cent., and the sound value of such shipments at the port or place of destination should not be deemed to exceed the same per cent. on the purchasing prices at the shipping port. That on freight risks in case of the actual or technical total loss of the vessel under the insurance upon her, a total loss of freight to be paid under the insurance, any savings of freight then on board to be for the benefit of the company; that in case the vessel should not be totally lost, the liability under such insurance should not be greater than the actual loss by such disaster of the freight on board.

That all approved endorsements on the pass-book given by such company under such policy were to apply in all respects to such policy the same as if endorsed thereon, and not otherwise; risks applicable thereto to be reported to such company for endorsement as soon as known to be assured. And it was further agreed that dried beef, hams, ba-
12 con, fire-crackers and other fire-works, saltpetre, hops, guano, rice, peas, and beans, matts and matting, flaxseed, seed of all kinds, bleaching powders, soda-ash, bicarbonate of soda, sal-soda, cream of tartar, burlaps, hessi and floor cloths, straw goods; bar, bundle, rod, hoop, and sheet iron; wire of all kinds, tin plates, steel, madder, sumac, wicker and willow ware, (manufactured or otherwise,) salt, grain of all kinds, tobacco, Indian meal, fruits, (whether preserved or otherwise,) cheese, dry fish, vegetables and roots, rags, dye-woods of all kinds, mahogany, and other woods, hempen yarn, bags, cotton bagging and other articles used for bags or bagging, pleasure carriages, household furniture, skins and hides, musical instruments, looking glasses, and all other articles that were perishable in their own nature, were warranted by the assured, free from average, unless general; that hemp, flax, tobacco-stems, cassia (except in boxes,) and oil-cakes were free from average under twenty per cent., unless general; and that sugar and bread were warranted by the assured free from average under seven per cent., unless general; coffee, in bags or bulk, pepper in bags or bulk, and cassia in

boxes were free from average under ten per cent., unless general.
13 That on risks from China, each ten packages of silk or other dry goods, in the order of invoice, were subject to separate average.

That each interest of $5,000 insured value or less was subject to separate average; that if over $5,000, value of each of the following kinds of teas: imperial, gunpowder, hyson, hyson skin, young hyson, and black teas, and each $5,000 value thereof in the order of invoice were subject to separate average, and that the different excesses over $5,000, were subject to average if the damage amounted to $250. That if the risks covered should have begun and terminated before the date of such policy, then there should be no return of premium on account of such termination of the risk, and in all cases of return of premium, in whole or in part, not less than one-half per cent. upon the sum insured should be retained by the assurer. And it was also agreed by a memorandum in writing, written on the margin of the said policy, that the said policy was to be continuous, covering as above all the shipments made by vessels sailing prior to the unless sooner discontinued by either party on giving the other days' notice, whether the same should exceed the amount of subscription thereon or not: the premium on such excess to be paid from time to time when the amount of
14 the same should be ascertained, but that this limitation of time should not be deemed as prejudicing the amount of subscription thereon.

That the aforesaid policy was underwritten to the amount and extent of eight thousand dollars, and in witness thereof, the defendants caused the said policy and the sum so insured as aforesaid to be subscribed by their president and attested by their secretary in New York, the seventh day of March, one thousand eight hundred and sixty-two, as by the said policy will, on reference thereto, among other things, more fully appear; of all which said premises the said defendants, afterwards, to wit, on the day and year, and at the place aforesaid had notice.

And the plaintiff further says that the said policy was afterwards, and at divers times, underwritten in various other additional sums, and was in full force and effect before and at the time of the insurance and loss hereafter mentioned at New York, to wit, in the southern district aforesaid.

And the plaintiff further says that, afterwards, to wit, on the 25th day of September, in the year 1867, at New York, to wit, in the southern district aforesaid, a large quantity of machinery, to wit, eight pieces and eight boxes of machinery of great value, to wit, of the value
15 of two thousand two hundred and fifty dollars, had been and were shipped and loaded in and on board of a certain bark or vessel called "Ella Adelle," to be carried and conveyed therein on freight from thence to Havana, and there to be delivered to the plaintiff; and thereupon, afterwards, to wit, on the twenty-sixth day of September, in the year last aforesaid, at New York, to wit, in the southern district aforesaid, the defendants were duly notified of the shipment, and they were then and there requested to accept the risk thereon and to become insured thereof under the aforesaid policy of insurance upon the voyage aforesaid.

And the plaintiff further says that the defendants did thereupon, then and there, to wit, on the day and year, and at the place last aforesaid, accept and take upon themselves the risk of the said machinery upon the said voyage in the policy of insurance mentioned, and did, then and there, in consideration of a large sum of money, to wit, the sum of thirty-nine dollars and thirty-eight cents as a premium therefor, to them paid

by the said plaintiff, endorse the same upon the said policy by making an entry thereof in the pass-book mentioned and referred to in the said policy; and the plaintiff avers that the said defendants did thereby,
16 then and there, to wit, on the day and year, and at the place last aforesaid, become insurers of the aforesaid machinery, free from particular average to the amount and value of two thousand two hundred and fifty dollars against the perils, losses, and misfortunes in the body of the said policy mentioned at New York, to wit, in the southern district aforesaid.

And the plaintiff further says that, the aforesaid insurance was effected by the said F. C. Yzquierdo, as the agent for and on behalf of the said plaintiff, who was then and there the owner of the said machinery, and to cover and protect his interest therein, and that the said F. C. Yzquierdo was his agent to collect & receive any loss that might accrue under the said policy for the use of the said plaintiff; of all which the said defendants, afterwards, at New York, to wit, in the southern district aforesaid, had notice.

And the plaintiff further says that he was, then and there, and from thence continually afterwards, until and at the time of the loss hereafter mentioned, interested in the said goods in the endorsement upon the said policy of insurance mentioned and so shipped on board the said vessel as aforesaid, to a large value and amount, to wit, to the
17 value and amount of all the monies insured or caused to be insured thereon as aforesaid at New York, to wit, in the southern district aforesaid.

And the said plaintiff further says that, afterwards, to wit, on the thirteenth day of October, in the year last aforesaid, the said vessel, with the said machinery on board thereof, departed from New York aforesaid on her said voyage towards Havana, and that whilst proceeding on her said voyage, and while the aforesaid policy was in full force and effect, and the aforesaid machinery so shipped by the plaintiffs, as above stated, fully protected thereby, and before the arrival of the said vessel at Havana aforesaid, to wit, on the twenty-third day of October, in the year last aforesaid, the said vessel was by and through the violence of the winds and waves and the dangers and accidents of the seas, forced and driven upon the rocks at or near Punta Batten and wrecked, whereby she became and was totally lost. And the aforesaid machinery became and was thereby and by the perils in the said policy mentioned, and thereby insured against, physically and wholly lost to the said plaintiff, to wit, at New York, in the southern district aforesaid; of all which said several premises the said defendants, afterwards, to wit, on the day and year and at the place last aforesaid, had notice.

18 And the plaintiff further says that, afterwards, to wit, on the 25th day of October, in the year last aforesaid, at New York, to wit, in the southern district aforesaid, he produced and made to the said defendants due proof of loss and of his interest in the machinery so insured by the defendants, as aforesaid; and thereupon, afterwards, and at the expiration of thirty days after proof of such loss and interest, he requested the defendants to pay him the sum of two thousand two hundred and fifty dollars, so insured, upon the said machinery as aforesaid; nevertheless, the said defendants, although often requested, have neglected to pay the same, or any part thereof, to the said plaintiff, but to pay the same, or any part thereof, have hitherto wholly refused, and still do refuse, to the damage of the said plaintiff of five thousand dollars; and therefore he brings his suit, &c.

And the said defendants, The Great Western Marine Insurance Company, by Evarts, Southmayd and Choate, their attorneys, come and defend the wrong and injury, when, &c., and say that they did not undertake and promise in manner and form as the said plaintiff has above thereof complained against them; and of this they put themselves
19 upon the country; and the said plaintiff doth the like, &c.

Therefore the issue above joined is ordered by the said circuit court to be tried at a stated term of the said circuit court, appointed to be held at the court-room of the said court, in the city of New York, on the third Monday of October, in the year 1870.

And now, on this 29th day of December, in the year last aforesaid, before the honorable Samuel Blatchford, one of the judges of this court, at a stated term thereof, held at the city of New York, in the southern district of New York, came as well the plaintiff as the defendants, by their respective attorneys as aforesaid, and the jurors of the jury on this behalf summoned also came, who, to try the said issue, were duly chosen, tried, and sworn. And the jurors aforesaid, on their oaths aforesaid, did say that the said defendants did undertake and promise, in manner and form as the said plaintiff has above in that behalf complained against them. And they assess the damages of the said plaintiff by reason of the premises over and above his costs and charges by him about his suit in this behalf expended to two thousand six hundred and eleven $\frac{55}{100}$ dollars, and for their costs and charges to six cents. And now at this day, that is to say, on the day and year and place last aforesaid, before the justice aforesaid, came the parties aforesaid,
20 by their attorneys aforesaid; and thereupon the said defendants here bring into the said court, before the aforesaid justice thereof, a certain bill of exceptions taken at the said trial, and pray that the same may be entered upon the record of the proceedings in this cause, and it is granted to them, &c., and hereupon the said bill of exceptions is enrolled in the words and figures following, to wit:

21 In the United States circuit court.

JAMES FOGARTY
vs.
THE GREAT WESTERN INSURANCE COMPANY.

And afterwards, to wit, at a term of the circuit court of the United States, held at the city of New York, in and for the southern district of New York, in the second circuit, on the 29th day of December, in the year one thousand eight hundred and seventy, before the honorable Samuel Blatchford, one of the judges of the said circuit court, the issues so joined between the said parties as aforesaid came on to be tried by a jury of said district for that purpose duly impanelled, good and lawful men of the said district, at which day came as well the said plaintiffs as the said defendants by their respective attorneys aforesaid; and the said jurors being called, also came and were there and then duly sworn to try the said issue, and upon the trial of said issue, the counsel for the plaintiff to maintain the issues on his part produced a paper-writing, signed by the defendant, commonly called a policy of insurance, a copy of which is hereto annexed and marked A.

22 The plaintiff, further to maintain the issues on his part, was then sworn as a witness on his own behalf, and testified as follows:

I am 39 years of age. I reside at Hoboken, New Jersey, but spend

a great deal of time in Havana, Cuba. I expect to leave here on Thursday next for Havana, and do not know when I will return; I was the owner of the sugar-packing machine mentioned in these proceedings at the time of their shipment and loss. F. C. Yzquierdo was my agent to effect the insurance on that property. He had no interest in the property. The insurance was entirely for my benefit. I am the plaintiff in this cause. I am acquainted with the sugar-packing machines. I am the inventor of them. I am a practical machinist. These machines are made at Newark, New Jersey. There is no other place where they are manufactured. I was in the city of Havana at the time the "Ella Adele," which had the machinery on board, was wrecked. I heard of her loss about the mid-day of the same day of the loss. I knew that I had property aboard her, because I had the bill of lading. I went down to the wreck, I think, the next day. They had not commenced to take out cargo. There were some days before they took out anything
23 on account of the weather. When I first went to her her deck was almost flush with the water. The side next to the shore was under water. She had rolled up towards the shore. She lay on the rocks. In one—about one—week after I saw her again; at that time they had hardly got anything out. They had some wooden horse-cars on the deck that they were trying to get off. I went there several times after that. Mr. Tyng was the agent in charge of the vessel. He is the underwriter's agent there. When the vessel broke up entirely we saw portions of our machinery, and then we could only see it when the waves receded. After the storm had cleared the sea went down, & then we could see the parts in the ship. All we could see was the front frame that stood up on end. They were working at the cargo for a month generally before they got it all out. I received a notice from Mr. Tyng when they had got out all of my machine they could get out. I did not go to the wreck again after receiving that notice. Mr. Tyng asked me to go down and receive it on the beach. I consulted a friend of mine, and he told me not to touch it. Mr. Tyng then had the machinery conveyed to a public storehouse; it was a good, dry storehouse. I cannot say how soon after it was placed in the store before I saw it; but
24 I suppose within a month, because I was in the country going backward and forth attending to my duties.

What was saved of it was laid up in a pile in the corner. I went there one day with the intention of looking it through. I had two men with me. I did not go through it at all, because I was convinced that it would be of no use to overhaul a pack of old iron. I noticed that a great many of the pieces were broken, the racks, governor, cylinder, and many other pieces that I can't recollect without referring to my list. The condition of that which was saved I considered perfectly spoiled by rust and breakage. It was rusted so bad that I did not think it worth while to handle it. The pieces that were there could not have been set up and made a perfect machine, because it would be impossible to re-adjust the numerous pieces because they would have to be returned and refitted, and then they would be too small and too weak, and they would no longer fit in their respective places. It was so badly rusted that all the bright work would have to be returned. By supplying the broken and missing pieces you could not have made a perfect
25 machine. None of the pieces that were there could have been used as they were in constructing a new machine. There is a large machine shop in Havana belonging to American family. They said that they could not take those pieces and make the machine anew. The framing could be remelted, the framing is of cast iron. I would

rather make a new machine than to attempt to repair that one, there were so many pieces missing. It could not have been repaired. When complete, the machinery consisted of one complete sugar-packing machine, and three extra truck-irons. These truck-irons were for machines that had gone out the year before. The machine proper had three sets of truck-irons with it; that is, connected with it. The whole thing lay in a pile, and you could not tell one truck-iron from another. The axle-trees for the truck-irons are turned and fitted on the end. They were very much rusted and most of them bent; they were all twisted up in a snarl. I speak of all the truck-irons that laid there. They could not have been used in the condition that they were in. They would have had to be returned, which would have spoiled them for that use. Mr. Tyng tried his best to get me to take the machinery, but I declined.

26 I don't think the rust would increase while the machinery was in a dry place, because on cast-iron that part that the scale is not taken off by turning, filing, or planing, the water has very little effect on it. The turned parts will rust and scale.

The same witness, sworn as above, then cross-examined on the part of the defendants, doth depose and say as follows:

I served an apprenticeship of five years at Hewes & Phillips' machine-shop in New Jersey, which was five years loss to me, because I might have made a great deal more money employed in some other business. I have had these sugar-packing machines made at Watts, Campbells & Co.'s machine-shop at Newark, New Jersey. I believe when I first commenced to make them there were a few made at Hewes & Phillips' machine-shop. I never have manufactured them myself. I am the inventor and patentee. The patent is dated about June, 1864. The trucks are included in the patent.

After getting through my apprenticeship, which ended in July, 1851, I remained with Hewes & Phillips as a journeyman machinist, putting

27 up machines for them for about one month. Since then I have been employed in Havana as engineer for a gentlemen named Herrera, as practical engineer to attend to all the machinery on a sugar plantation. There are two sizes of these packing machines; there is only one size in use now. This one is the largest size, and moved by steam-power. The first ones made were moved by hand. They were small ones, and the use of them is discontinued. The bill of lading is still in my possession. I think I have one home. (The bill of lading was produced, and annexed to witness' deposition, it being marked "A, E. L. O., U. S. com'r, Oct. 19, 1869.") I did not take the property, because it was no use to me. Mourque & Co., importers of machinery from Paris and Belgium at Havana, advised me not to take the machinery.

1. Q. Why did you discontinue overhauling it?

A. Because I was convinced that it was labor in vain, because it was so badly damaged.

2. Q. When you began to examine, had you heard that the company would not pay the insurance?

A. I don't think I had. I did not hear it before I had discontinued my examination.

28 3. Q. Were you not advised that to receive it, or even to examine it, might prejudice your claim for the insurance?

A. I don't recollect that I was.

4. Q. Had that motive nothing to do with your conclusion not to receive it or to examine it?

A. No, sir.

5. Q. What did you mean by saying on the direct-examination in that connection "when I found the company was not going to pay?"

A. I did not know positively until some time after I arrived here, which was some time in June, 1868, that the company was not going to pay.

6. Q. You say that you found many pieces that were broken. Did you not find many more that were not broken?

A. I saw a number of pieces that were not broken. I could not say whether a majority of the pieces were whole or broken.

7. Q. How much of the machinery was polished work?

A. From about one-third to half.

8. Q. Were any of the pieces which were not polished work broken?

A. Yes, sir; I saw some of them broken. I did not count them. I saw them laying around on the floor.

9. Q. Were the pieces that were not polished damaged materially by rust?

29 A. Yes, sir; by being in the water.

10. Q. Were not all the parts not polished saved?

A. They were not.

11. Q. Which of them were not?

A. I cannot particularize.

12. Q. How do you know, then, that any of those parts were missing?

A. I knew by the bulk of iron laying on the floor that many of them were missing.

13. Q. Do you mean to say that the pieces not polished which were saved without breakage could not have been worked into a new machine at the place of manufacture?

A. Yes; I do.

14. Q. Do you mean to say that no use could have been made of them at the place of manufacture?

A. They could not without remelting.

15. Q. Why not?

A. Because the moment we would commence to turn an axle down, or plane off any of the framing, it would disarrange the distances and disorganize the combination entirely.

16. Q. Do you mean to say that nothing of what was saved could be used again at the factory where it was made?

A. Yes, I do; without making an entire new set of patterns.

17. Q. What would that cost?

30 A. It would cost more to make new patterns than to make a new machine.

18. Q. Which parts of the machine were painted?

A. All the bright work, when it leaves the shop, is tallowed. The cast-iron work painted what they call lead color, the same as is done with all machinery that is to be shipped.

19. Q. Which of the painted cast-iron pieces did you see injured by rust?

A. The salt water had eaten the paint off of all of them, and had rusted the iron in every part. I discovered that when the machinery lay on the beach.

20. Q. If it lay all in a heap so that you could not tell which pieces were broken, how could you tell that every piece was rusted all over?

A. All the pieces that I saw were rusted. I saw the front frame, back frame, and the fly-wheel, being the most prominent pieces, and some small pieces laying around, that I can't enumerate now.

21. Q. Was the machine perfect without the trucks which were contained in the three separate boxes?

A. Yes, sir; it was.

22. Q. Did you examine those three trucks, or either of them?

31 A. I could not tell of the pieces which were remaining which trucks they belonged to.

23. Q. Did you examine any of the trucks saved?

A. I merely looked at the pile of iron as it lay there.

24. Q. Can you say whether any, & if so, which, of the trucks was broken?

A. The truck-irons were broken, and I could not tell whether they belonged to the machine proper or to the extra trucks.

(A paper being here shown him, witness said thereon:)

It is in my handwriting, with the exception of Weeks & Foster, which is attached to it.

(The paper in question was marked "B, E. L. O., U. S. com'r., Oct. 19, 1869," and annexed to the deposition of witness.)

Weeks & Foster are the attorneys I employed to prosecute this claim. I furnished them with the paper marked "B," as a statement of the condition of the machine as discharged at Havana. The document marked "B" contains a statement of all the parts in the truck-irons and in the machine as shipped complete, and the memeranda in the margin refer to the condition when discharged on the beach at Havana.

32 25. Q. How did you get the information for making the memoranda in the margin?

A. Principally from memory.

26. Q. Have you not said in your examination to-day that you did not examine the parts of the machinery particularly?

A. I did not examine the machinery in the storehouse as it laid in a pile. I did on the beach.

27. Q. Can you now specify, more particularly than is done in this document, how many and which of the pieces were lost?

A. No; I cannot.

28. Q. Or which of the pieces were broken, except as mentioned here?

A. No.

29. Q. Or which of the pieces were rusted, excepted as mentioned here?

A. No.

30. Q. Were not the pieces lost mostly small pieces?

A. Yes, sir; they were.

31. Q. How were they lost?

A. The small pieces were shipped in boxes in the cases, and when the vessel and the boxes went to pieces together the small pieces could not be recovered. If they could have got the boxes out entire, the small pieces would not have been lost.

JAMES FOGARTY.

33 "*A*," *E. L. O., U. S. com'r, Oct.* 19, 1869.

Shipped in good order and well conditioned, by Watts, Campbell & Co., on board the B'r bark called the Ella Adelle, whereof Alexander is master for this voyage, now lying in the port of New York, and bound for Havana, to say: Eight pieces and eight boxes machinery, being marked and numbered as in the margin, and are to be delivered in the like good order and condition at the aforesaid port of Habana (the dangers of the sea only excepted) unto

J. F. 13 pieces.
C. O. R. 2 do.
N. D. 1 do.

James Fogarty, esq'r, or to his assigns, he or they paying freight for the said fifty-one $\frac{09}{100}$ dollars, gold, with 5 % primage and average accustomed.

In witness whereof the master of purser of the said vessel hath affirmed to bills of lading all of this tenor and date; one of which being accomplished, the other to stand void.

[10 c. U. S. rev. stamp, cancelled.]

34 Dated in New York the day of Oct., 1867.
For the captain:

M. TRISJILLO.

"*B*," *E. L. O., U. S. com'r, Oct.* 19, 1869.

[Rec'd & ans'd 11 Aug.—J. A. P.]

58 WALL STREET, NEW YORK,
August 10, '68.

JOHN A. PARKER, Esq.,
V.-Pres't Great Western Ins. Co.

DEAR SIR: Communications between your office and ours seem dilatory, as your respects of 3rd instant was not received until Thursday. We have, at considerable trouble, obtained for you a written list of the separate pieces, by name, composing the machine, and also a list of the other machinery. The information is all in the possession of your agent, Tyng, who can inform you precisely what pieces were lost and what pieces in a damaged & broken condition he landed & stored. We have made inquiries and have named on these lists the result of those enquiries. If you will examine the proofs already furnished, we are told that you will find the value of the articles insured there given,
and also the value of the pieces which the underwriters' agent
35 landed and stored. That value was, we think, about fifty dollars,
the value of the machinery insured being 2,250$, the amount of the insurance, we presume.

Resp'y,

WEEKS & FOSTER.

TRUCK-IRONS.

Several lost.....	24 axles, 42 in. long, 1¼ iron.
Several lost.....	48 wheels, 8 " diameter.
Several lost.....	48 cast-iron boxes.
All lost.....	98 bolts for "
Several lost.....	27 pieces cast-iron racks.
Lost.....	108 wood-screws, ½ x 3 for same.
Lost.....	12 ¾ x 8½ bolts, with nuts.
Bent & broken.....	3 square-threaded screws.
Rusted.....	3 nuts, flanged for "
Some lost.....	3 wrought-iron handles for threaded screws.
Several lost.....	3 swivels for threaded screws.
Several lost.....	6 cast-iron hoop plates.
Several lost.....	6 " " angle iron.
Several lost.....	9 " " steps.
Lost.....	18 bolts, ½ x 5.

Several lost..... 12 hook-clamps, brass nuts, with square thread.
Several lost..... 3 round " " " " " "

Besides the truck-irons usually sent with the machine, there were three extra sets of truck-irons and one indicator. These truck-irons were in great part also lost & destroyed, & the indicator was lost.
36 B, E. L. O., U. S. com'r, Oct. 19, 1869.

List of pieces composing 1 *sugar-packing machine.*

Broken..... front lower frame.
Broken..... back " "
Broken..... top-front " "
Bolts broken out..... " back "
Bolts broken..... engine frame.
Bolts broken..... top cross-tie.
Bolts broken..... bottom " "
Broken..... pump bracket & pump.
Rusted..... 4 rolls, turned and polished.
Rusted..... 4 crown-wheels.
Rusted..... 1 spun-wheel.
Rusted..... 1 fly-wheel.
Rusted..... 1 pinion to drive spun-wheel.
Spoiled & broken.... 8 Babbitt-metal bearings.
Several lost..... 10 pounder feet.
Several lost..... 10 straps, 3 fly, $\frac{3}{2}$ face.
Several lost..... 10 caps for pipes of pounder.
Several lost..... 20 pipes, $1\frac{1}{4}$.
Several lost..... 10 stay-rods for pounder.
Several lost..... 20 jam-nuts " "
Several lost..... 10 plates for caps " " (B, E. L. O., U. S. com'r, Oct. 19, 1869.)
All lost..... 10 $\frac{5}{8}$-bolts for caps.
Several lost..... 10 plates for pounder feet.
Several lost..... 10 $\frac{5}{8}$-bolts " "
Lost..... 1 check-valve, $1\frac{1}{4}$ for pump.
Lost..... 1 $\frac{1}{4}$-cock " "
37 Lost..... 2 pair flanges for pump.
Lost..... 1 connecting-rod " "
Lost..... 1 plunger " "
Lost..... 2 anchor-bolts " "
Lost..... 6 anchor-bolts for machine proper.
One lost..... 2 tripper-bars, with levers.
Half lost..... 10 toes keyed on tripper-bars.
Lost..... 2 steadying bars.
Some lost..... 10 $\frac{1}{2}$ moon dogs, moveable.
Several lost..... 10 $\frac{1}{2}$ moon dogs, stationery.
Lost..... 3 pedestals for tripper bars
Several lost..... 6 " " stationary "
Several lost..... 10 wrought-iron levers.
Several lost..... 10 weights for "
Lost..... 2 connecting-rods for tripper-bars with teeth.
Lost..... 2 plain guides for connecting-rods.
Lost..... 1 shaft for tripper-bar motions.
Lost..... 2 pedestals " " " "
Lost..... 2 pinions " " " "

Lost		1 sexton " " " "
Rusted & bent		1 shaft, with two crank handles and one pinion to gear in sexton.
Lost		1 steel shaft, with two handles and one pall.
Lost		1 moveable collar for do., with set bolt.
Lost		1 crank-shaft pinion of truck-moving gear.
Lost		2 handles for truck " " "
Lost		2 wrought-iron studs " " "
	Rusted	1 pinion " " " " "
38	Lost	1 bevel wheel " " " "
	Lost	1 stud " " " "
Lost		1 tightener, with adjustable plate.
Lost		1 shaft for pinion of truck.
Lost		1 pinion " same.
Lost		3 boxes " "
Lost		1 chain " "
Lost		2 grooved wheels.
Lost		1 latch to ungear.
Rusted & broken to pieces		1 Pickering governor.
Lost		1 governor stand.
Lost		1 fork lever for governor.
Lost		1 straight " " "
Lost		1 connecting-rod downwards.
Lost		1 belt crank below.
Lost		1 stud " "
Lost		1 connecting-rod out to throttle.
Bent, & bolts broken.		1 steam-oscillating cylinder.
Lost		1 angle valve to give steam to same.
Rusted & broken		1 stub-end to connect piston-rod to crank pin.
Rusted & broken		1 piston-rod of steel.
Rusted & broken		1 piston, with brass rings and steel springs.
Lost		1 valve motion complete, with all its parts. (B, E. L. O., U. S. com'r, Oct. 19, 1869.)
Lost		1 double crank to give motion to valve.
Lost		1 connecting-rod " " " " "
Lost		1 yoke to steady steam-pipe.
	Lost	1 " " " exhaust "
39	Broken & rusted bolts & nuts lost.	1 wrought-iron cross-piece to steady angle-valve with 2 double-threaded bolts & nuts.
Lost		1 brass elbow for exhaust with flange & bolts.
Rusted		1 crank shaft.
Rusted		one fly-wheel.
Rusted		2 bolts to hold fly-wheel to pinion.
Lost		bolts.
Lost		54 $\frac{3}{4}$ bolts.
Lost		41 $\frac{3}{4}$ "
Lost		4 1 bolts with 8 jam nuts.
Lost		36 $\frac{5}{8}$ "
Lost		8 $\frac{7}{8}$ "
Lost		14 $\frac{1}{2}$ "
Lost		4 $\frac{3}{4}$ steel " with jam-nuts.
Lost		8 1 in. steel-bolts with jam-nuts.
Lost		10 $\frac{7}{8}$ " "
Lost		8 $\frac{3}{4}$ "

Lost..... 30 3/4 "
Lost..... 8 3/4 "
Lost..... 10 steadying-pins, tapered.

The plaintiff, further to maintain the issues on his part, called as a witness CHARLES D. KING, who, being duly sworn, testified as follows:

I reside at Havana. In Oct., 1867, I was agent of the New York underwriters at Havana, for the Great Western Insurance Company. I had a verbal appointment which was afterwards made in writing. I had been agent for the underwriters generally for about 4 or 5 years.
40 I remember the loss of the Ella Adele in Oct., 1867. I saw her daily and nightly after she was lost. She was thrown on the rocks, broadside on, near the Punta Fort. She bilged a few hours after striking, and the tide ebbed and flowed in her before I was able to begin to save anything. First, as she was laboring very heavily, I had the masts cut away to prevent their breaking her up. A day or two afterwards (I forget exactly when) I commenced getting what cargo I could out of the hatches. I cut a hole in her side and got some cargo out of that. I came across sugar-packing machinery and a great deal other machinery. It was found on the bottom covered with water. At last the vessel was thrown higher up & then portions of it would be out of water at low tide. The vessel was entirely broken up. Many things of the cargo were lost in deep water. The wreck was sold as fire-wood. It was sold and afterwards used as fire-wood. I did not know at the time whether the machinery was complete or not. I went on saving piece after piece as it came up, & when I had saved all I could I saw Mr. Fogarty, who examined what I had
41 saved and informed that the machine was not complete. The parts that were saved were first put on the beach and afterwards removed to a store-house called "The Chorro." As it was fished up it was very much rusted and the polished surfaces were badly eaten into. I think that on the afternoon of the third day I was able to begin to get out cargo, and I think it was about one month before I finished getting out cargo, and during all that time the water ebbed and flowed in the ship. There were a great many days I could not work at all. I think Mr. Fogarty took a memorandum of the parts taken out. I did not assist. I don't think I got out a single box whole. I think there was one box that seemed to have wheels in, that we had to break to get the things out. I suppose the cargo would have been delivered on lighters —the place of delivery was inside the port which was about a mile up the harbor from where the wreck lay.

On being cross-examined by defendant's counsel, witness said:

I have been in Havana off and on some thirty years. I have been regularly there for the past 12 or 14 years. I was here in January, 1868.

Q. Do you recollect reporting at the time to the company that
42 this machinery of Mr. Fogarty's, by the bark Ella Adele, was almost entirely saved.

A. I do; but I referred to the bulk of iron saved. Mr. Fogarty admitted that there was nearly half of the iron saved. The machinery was all iron. I should think that over half of the iron was saved. I can't say that nearly all was saved.

Q. Can you also state at what expense of salvage and of moving it was finally placed in store at Havana?

A. I cannot, except by reference to a letter. My impression in Janu-

ary, 1868, was that the expense pro rata of the salvage was about 26 dollars, gold, and about 34 dollars, gold, for the moving, or transportation to the city of Havana, and one month's storage. I paid those charges upon it. I know that was about the amount, for I paid it. At the time it reached store in Havana Mr. Fogarty was in Havana and was in communication with me.

Q. You say you were agent of the defendant at that time. What instructions had the defendant given you in respect to this machinery up to the time it was landed and stored?

A. It was all in letters from the company in New York, and those letters are in Havana.

Q. When you say the polished surfaces were badly eaten into, what do you mean?

43 A. I mean that those surfaces were chiefly fitted to other parts, and would have to be turned down or smoothed off to get an even surface for the bearings of those other parts that were to be fitted to them. Spots as large as a silver dollar were eaten into by rust. The polished surface was rusted off.

Q. This machinery was made for use in the manufacture of sugar, was it not?

A. Not for the manufacture, but for the packing of the sugar after it was made. There are no establishments in Havana where these machines are made or could be repaired. I satisfied myself of that by inquiries there; not only of people there, but by agents of the West Point Foundry. I took competent advice on the subject.

Q. Did you also find out what was the nearest point to which the parts saved could be sent to be repaired, and the missing portions replaced?

A. I did; and found that the portions saved, with the exception of a few pieces, would *would* have to be sent to the original machine shop or machine-shops where they were made, and that the missing pieces would have to be furnished from the same foundry from where the last ones had been made. I did not ascertain what would have been the

44 freight on it back to New York. It would have exceeded the outward freight on the whole.

Q. How much would the freight on the parts saved, back, exceed the freight on the whole out?

A. I cannot tell. This stuff still remains in store at Havana. An opportunity was given Mr. Fogarty, when it was landed and stored, to take possession of it. I asked him to do it.

On his re-direct examination the witness said:

Q. Did you, at that time, offer the entire shipment, or only those portions that were saved?

A. I only offered that which I had to offer. The iron was all rusted. The exception I referred to in one of my former answers were some weights that were not materially damaged. The truck-irons, as I understood, are parts of the machine. Some truck-irons were saved, but whether they were extra ones or original ones I cannot say, or whether any complete set was saved I cannot say.

CHARLES D. KING.

The plaintiff, further to maintain the issues on his part, called as a witness LOUIS MCCLELLAN, who, being duly sworn, testified as follows:

45 I am a native of . For the last twelve years I have

resided in Cuba. I am a machinist and engineer. I am acquainted with the Fogarty packing-machine. I have had charge of three of them in Cuba.

Q. You have heard the testimony of Mr. Tyng, in reference to the parts of the machine saved, and the parts lost, and the condition of those saved. State whether, in your opinion, that machine could have been used as it was landed on the beach?

A. It could not have been used. It was not all there, and could not have been set up. On any machinery or iron salt water corrodes more than fresh. The polished work could not have been returned and used in that machine. It would have reduced it in size.

Q. From what Mr. Tyng has stated, what would have been necessary to have constructed a new machine out of what was saved?

A. I cannot answer, because it could not have been used. Of course, all that was lost would have to be supplied—in the parts that were rusted also have to be supplied. It is possible that some of the parts that were saved might have been used in building another machine, but then it would not have been this machine. This was the only
46 way those parts could have been used. I went to the store-house where the machinery was stored. One half or two thirds of the weight of the iron might have been there, but none of the small work was there. I think one large piece of the framing was missing. I think none of the trucks were complete. There were some there. Those pieces that were there were in a damaged and broken condition.

Being cross-examined by counsel for defendants, witness said:

This was a complicated machine. I think it is unusually so. The absence of a few small pieces to any machine would prevent its being set up and used, as in a steam-engine the loss of a piece the size of my two fingers would prevent its being used.

LOUIS Mc LELLAN.

Subscribed & sworn to before me this 20th day of August, 1869.
EDWARD L. OWEN.

The plaintiff, further to maintain the issues on his part, called as a witness WILLIAM WATTS, who, being duly sworn, testified as follows:

I reside in Newark; am one of the firm of Watts, Campbell & Co., machinists and engineers; knew this sugar-packing machine; it
47 was made at my establishment; the machine weighed 7,000 lbs. I made this machine and shipped it. It consisted of one sugar-packer & three trucks. The sugar-packer was a machine for packing sugar, with the iron work for three trucks to hold the boxes while being packed. The iron work for the 3 trucks was part of the machine. There was also the iron work for 3 extra trucks. I was in Cuba in March and April after loss, and saw what was saved. I did not make thorough examination of it. Many of the parts were broken and many were missing. I made no memorandum of what I saw. The machine could not be restored. The parts that were left were broken and rusted so they could not be used again. The wheels to the trucks were some of them missing. The axles were saved, but it would have cost more to arrange them with new wheels than to have made new ones. The axles were turned for the journals and wheels. What I saw was worth nothing except as old iron. There was $\frac{2}{3}$ in weight left.

Being cross-examined, witness said:

There was not over 8,000 or 9,000 lbs. in the store-house. The parts were all in pieces. There were pieces without which it would have been useless as a machine.

And thereupon the plaintiff, having rested his case, the defendant's counsel requested the court to direct a verdict for the defendant on the grounds—

48 1st. That the insurance of the plaintiff's machinery being, by the terms of the insurance, "free from particular average," and a portion of the said machinery insured having been saved and arrived at the port of destination, the loss was not total, and the defendants are not liable therefor within the terms of the policy.

2nd. That the evidence on the part of the plaintiff will not sustain a finding by the jury that the loss was total.

But the learned court denied the motion and refused to direct a verdict for the defendants; to which ruling the defendant's counsel duly excepted.

The defendant's counsel thereupon, to maintain the issues on their part, produced and read in evidence the plaintiff's original application for the insurance, signed by F. C. Yzquierdo, the insured named in the policy. The application is as follows:

49 GREAT WESTERN INSURANCE COMPANY: [34146.

Value, $2,250.
On board the bark Ella Adele, at and from New York to Havana.
Bill of lading dated
Time of sailing.
Free from particular average.
Master's name.
Where built.
When built. 55.
Tonnage.
When last coppered. 11 25
When last inspected. 5 63
Present condition. 39 38
Rate.
Premium.

Enter on open policy of F. C. Yzquierdo, No. 27315, $2,250 on machinery shipped by Watts, Campbell & Co.

Subject to average as per memorandum in the policy on the printed tariff of this company, unless otherwise agreed upon.

Warranted by the assured free from loss on account of capture, seizure, detention, or destruction by or arising from any belligerent nation, or from any seceding or revolting State or States of this Union, or from guerril'a party, or by or from any officer, civil or military, or other persons claiming to act in their name, or under their authority, or in their behalf.

The amount insured by this application is expressed in the paper currency of the United States, and in case of loss is to be paid in that currency at the denomination value. Proof of loss to be authenticated by the agent of the company, if there be one at the place where such proofs are taken. To be approved of in accordance with the terms of the policy. Shipments by vessels carrying grain are warranted by the assured not to proceed to sea without the written approval of loading by the grain-inspector appointed by the New York board of underwriters.

New York, September 26, 1867.

(Signed) F. C. YZQUIERDO.
P. p. RAFL. DE C. PALAMINO.

Approved:

The defendant's counsel further produced an' read in evidence the preliminary proofs presented to the defendant on the part of the plaintiff, after the loss and before action brought, consisting of the bill of lad-

ing, invoice of the merchandize, and the protest signed by the master and certain of the crew of the Ella Adele. The bill of lading is as follows:

Shipped in good order and condition by Watts, Campbell & Co., on board the bark called the Ella Adele, whereof Alexander is master for this voyage, now lying at the port of New York, and bound for Havana, Cuba, to say: Eight pieces and five boxes, marked J. E., Havana; two boxes, marked C. O. R. Yngenio, San Francisco; one box, marked N. D. Yngenio, Santa Barbara, and composing one sugar-packer and three trucks, being marked and numbered as in the margin, and are to be delivered in the like good order and well conditioned, at the aforesaid port of Havana, (the dangers of the seas only excepted,) unto James Fogarty, or order, or to his assigns, he or they paying freight for the said machinery, fifty-one $\frac{09}{100}$ dollars, with 5% primage and average accustomed. In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date, one of which being accomplished, the others to stand void.

50

Weight, 12,774 lbs.
Freight, 51 09
2 55
$53 64

Weight and contents unknown. Not accountable for leakage, breakage, or rust.

Dated in New York the 19th day of September, 1867.

For the captain:

(Signed) M. FRUJILLO.

The invoice is as follows:

Invoice of five boxes containing one sugar-packing machine and three boxes with 3 trucks, shipped by the undersigned by the bark Ella Adele, Alexander master, and consigned to James Fogarty, Havana.

51	J. F. 5 boxes, containing one sugar-packing machine	1,890 00
C. O. R.	(2) two boxes with two trucks	150 000
N. D.	(1) one box with one truck	20 00
		2,070 00

CHARGES.

Insurance on $2,250 @ 1¾ p%	39 38	
Policy	1 25	
		40 63
		$2,110 63
Commission on $2,110.63, 2½ p%		52 76
E. & O. E.		$2,163 39

New York, September 20, 1867.

(Signed) F. C. YZQUIERDO.

The protest is as follows:

HAVANA, 26*th October*, 1867.

Before J. V. Cranford, H. B. M. consul in Cuba, personally appeared August Alexander, the master, W'm R. Johnson, the mate, W'm Fischer,

and Hays Tannier, seamen, all of Br. bark Ella Adele, of Nassau, N. P., set sail and departed from N. Y. Oct., '67, for Havana. That nothing particular occurred up to the 18th and the day following, during which they experienced strong gales with very heavy seas, the vessel rolling considerably and making a great deal of water, besides shipping large quantities of water on deck; pumps carefully attended throughout; that the weather moderating on the 20th, they made sail accordingly, and passed through the Hole in the Wall; next day passed
52 Styrrup Key, and on Tuesday, the 22nd, sighted the pass of Matanzas, the weather being very blustery, with strong wind from the northwestward, accompanied by heavy squalls of rain. On the 23rd, at 4 p. m., the wind increasing with a heavy cross-sea running, they steered right toward the entrance of the harbor of Havana, making all ready for anchoring and keeping the halyards and sheets clear for running. That when close in, at 6 p. m., the weather looking still more threatening and the sea increasing, they took in all light sails; but it being too late to enter the harbor, in endeavoring to haul off shore they were suddenly struck by a violent squall, which drove the ship ashore on the rocks, close to the "Punta Battery," the ship striking very heavily and immediately bilging, and the sea making a clear breach over her. That, at 9 p. m., the master ordered a hawser to be got ashore, which was done by securing one end of it to the fort and the other to the mizzen-mast, hove well tight, by which means the crew and their effects were enabled to reach the shore. That the master and the 2 mates remained on board until 3 a. m. of Thursday, the 24th, when, finding that the vessel had 8 feet of water in the hold, and that there was no hope of saving her, and the way she was thumping rendering it unsafe for them, they
53 were obliged to leave her by the same means as the rest of the crew. That at daylight the master returned on board and found the ship full of water and beginning to break up, a strong gale still blowing, and the sea being in such a state as to render any assistance from shore entirely out of the question. That the master then reported himself, with his crew, at this consulate and duly noted his protest.

(Signed) A. ALEXANDER.
W'M R. JOHNSON.
W'M FISCHER.
HAIS TANNIER.

Before—

(Signed) JOHN V. CRANFORD,
Acting Consul-General in Cuba.

And thereupon the defendant's counsel rested, and again requested the court to direct a verdict for the defendants on the same grounds upon which his original motion to that effect was based, and also because the insurance not being upon "one sugar-packing machine" and "three trucks," but simply upon "machinery" shipped, and a large part of the machinery so shipped and insured having arrived at the port of destination, the loss was not total, and the defendant, by the terms of the policy, is not liable; but the learned court denied
55 the motion, and refused to direct a verdict for the defendants; and to such ruling the defendant counsel duly excepted.

The counsel for the defendant then requested the court to charge and direct the jury that, upon the evidence, the defendant was entitled to a verdict, and that they should so find; but the learned court refused so to charge and instruct the jury; and to such refusal the defendant's

counsel duly excepted. The defendant's counsel then requested the court to charge the jury that the defendants would be liable, under the policy only, for an actual total loss of the subject insured, and not for the constructive total loss thereof; but the learned court refused so to charge; and to such refusal the defendant's counsel excepted.

And thereupon the defendant's counsel requested the court to charge the jury that, if the jury find that a large or any considerable part of the articles insured and shipped were saved and arrived at the port of destination, the loss was not total, and the defendants having only insured the goods "free from particular average," are entitled to a verdict; but the learned court refused so to charge; and to such refusal the defendant's counsel duly excepted and further requested the court to charge and instruct the jury that, if any portion of the machinery insured and shipped in the eight boxes mentioned in the invoice and bill of lading arrived in specie at the port of destination, the loss was not total, and the defendants are not liable under the policy; but the learned court refused so to charge; and to such refusal the defendant's counsel duly excepted.

The defendant's counsel further requested the court to charge and instruct the jury that if the operation of the perils of the sea upon the machinery did not alter its nature or character, but if any part of it, though damaged thereby, arrived at the port of destination at all in the form of pieces or parts of machinery of the character shipped, the loss was not total, and the defendants are not liable under the policy;
56 but the learned court refused so to charge; and to such refusal the defendant's counsel duly excepted.

The defendant's counsel further requested the court to charge and instruct the jury that there is no sufficient evidence to sustain a finding on their part that no piece of the machinery shipped arrived at the port of destination as a piece of machinery, or in the condition in which it was shipped; but the learned court refused so to charge; and to such refusal the defendant's counsel excepted.

The defendant's counsel further requested the court to charge and instruct the jury that, for damage from sea perils or other perils enumerated in the policy which happened on the voyage to the machinery insured, or any part thereof, but which did not result in its total destruction and prevent the arrival of any part at the port of destination, the defendants are not liable under the policy; but the learned court refused so to charge; and to such refusal the defendant's counsel duly excepted.

And thereupon the learned court charged the jury, among other things, as follows:

57 That the meaning of the term "free from particular average," used in the policy, was that the defendants should be liable only for a total loss of the subject insured; that the subject insured was not machines but machinery, by which is generally understood the several parts or portions of machines, adapted and fitted to be put together so as to constitute a machine, (in this case a sugar-packing machine,) and, applying the rule of law as to what constitutes a total loss to this particular subject insured, the jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition, so that it could have been used with its corresponding or connecting pieces had they also arrived in good condition; in that case the plaintiffs could not recover, as the loss would not be total; but that if every piece of the machinery was so damaged by the perils insured against

as to be entirely unfit for use on being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured as machinery, although the material itself might still exist; and if they so found, they would find a verdict for the plaintiff for the sum named in the policy with interest from the tenth day of September, 1868.

58 And thereupon the defendant's counsel excepted to the following portions of the charge separately and specifically:

To the charge that the subject insured was not machines but machinery, by which is generally understood the several parts or portions of machines, adapted and fitted to be put together so as to constitute a machine, (in this case a sugar-packing machine.)

To the charge that jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition, so that it could have been used with its corresponding or connecting pieces had they also arrived in good condition.

To the charge that if every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use, or being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured as machinery, although the material itself might still exist.

To the charge that if they found that every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use, on being supplied with its corresponding or connecting pieces, although the material itself might still exist, they would find a ver-

59 dict for the plaintiff for the sum named in the policy, with interest from the tenth day of September, 1868.

And thereupon the jury, having considered of their verdict, did find for the plaintiff for the sum of two thousand six hundred and ten dollars and ninety-three cents.

And afterwards the said defendants duly moved in the said circuit court, before the said judge, for a new trial, and to set aside the said verdict upon the said exceptions, which motion was, after argument, denied.

And inasmuch as the said several matters, so produced, and given in evidence on the part of the plaintiff and defendants, respectively, and the said requests to charge, and refusals thereto, and the said charge and exceptions thereto, do not appear by the record of the verdict aforesaid, the said counsel for the defendants did propose these, his exceptions, in writing to the said refusals to charge, and to the said several portions of said charge, and requested the said justice to put his seal to this bill of exceptions, containing the said several matters, so produced and given in evidence, and the said charge and exceptions as aforesaid, according to the form of the statute in such case made and provided.

And thereupon the said justice of the said court, at the request

60 of the said counsel for the defendants, did put his seal to this bill of exceptions, pursuant to the said statute and the rules and practice of the said court, on the day of September, in the year one thousand eight hundred and seventy-two.

61 And because the said court of the people, before the aforesaid justice thereof, now here, are not yet advised what judgment to give of and upon the premises, therefore the process is continued between the parties aforesaid, of the plea aforesaid, in this same court, before the justice thereof, until the 15th day of July, of the term of May, in the year of our Lord one thousand eight hundred and seventy-two, at the United States court-rooms, in the city of New York; and the same

day is given to the parties aforesaid, at the same place, to hear the judgment of the said court thereupon. Upon which day come the parties, by their said attorneys; whereupon, all and singular, the premises being seen, and by the court here fully understood, and mature deliberation being there had, it appears to the said court, now here, that the verdict aforesaid, of the jurors aforesaid, in form aforesaid, given as in all respects good and valid in the law, anything in the said bill of exceptions contained to the contrary thereof in anywise notwithstanding.

Therefore it is considered that the said plaintiff do recover against the said defendant his said damages, costs, and charges by the jurors aforesaid in form aforesaid assessed, and also four hundred and forty-five $\frac{20}{100}$ dollars for the said costs and charges by the court, now here, adjudged of increase to the plaintiff,

2,611 95
445 20
$3,057 15

62 and with his assent, which damages, costs, and charges, in the whole, amount to three thousand and fifty dollars and fifteen cents.

And the said defendant in mercy, &c.

R. E. STILWELL,
Deputy Clerk.

(Indorsed:) U. S. circuit court. James Fogarty. The Great Western Marine Insurance Company. Judgment record. Owen, Nash & Gray, plff's att'ys, 71 Wall st. Filed Sept. 26, 1872.

63 In the United States circuit court.

JAMES FOGARTY
vs.
THE GREAT WESTERN INSURANCE COMPANY.

And afterwards, to wit, at a term of the circuit court of the United States, held at the city of New York, in and for the southern district of New York, in the second circuit, on the 29th day of December, in the year one thousand eight hundred and seventy, before the honorable Samuel Blatchford, one of the judges of the said circuit court, the issues so joined between the said parties as aforesaid, came on to be tried by a jury of said district, for that purpose duly impanelled, good and lawful men of the said district, at which day came as well the said plaintiffs as the said defendants, by their respective attorneys aforesaid, and the said jurors being called, also came, and were, there and then, duly sworn to try the said issue; and upon the trial of said issue, the counsel for the plaintiff, to maintain the issues on his part, produced a paper-writing, signed by the defendant, commonly called a policy of

64 insurance, a copy of which is hereto annexed, and marked A.

The plaintiff, further to maintain the issues on his part, was then sworn as a witness, on his own behalf, and testified as follows:

I am 39 years of age; I reside at Hoboken, New Jersey, but spend a great deal of my time in Havana, Cuba. I expect to leave here on Thursday next for Havana, and do not know when I will return. I was the owner of the sugar-packing machine mentioned in these proceedings, at the time of their shipment & loss. F. C. Yzquierdo was my agent to effect the insurance on the property. He ad no interest in the property. The insurance was entirely for my benefit. I am the plaintiff in this cause. I am acquainted with the sugar-packing machines. I am the inventor of them. I am a practical machinist. These machines are made at Newark, New Jersey. There is no other place where they are manufactured. I was in the city of Havana at the time the

Ella Adele, which had the machinery on board, was
65 wrecked. I heard of her loss about mid-day of the same day of the loss. I knew that I had property aboard her, because I had the bill of lading. I went down to the wreck, I think, the next day. They had not commenced to take out cargo. There were some days before they took out anything on account of the weather. When I first went to her, her deck was almost flush with the water. The side next to the shore was under water. She had rolled up towards the shore. She lay on the rocks. In about one week after I saw her again. At that time they had hardly got anything out. They had some wooden horse-cars on the deck, that they were trying to get off. I went there several times after that. Mr. Tyng was the agent in charge of the vessel. He is the underwriters' agent there. When the vessel broke up entirely, we saw portions of our machinery, and then we could only see it when the waves receded. After the storm had cleared the sea went down and then we could see the parts in the ship. All we could see was the front frame that stood up on end. They were working at the
66 cargo generally for a month before they got it all out. I received a notice from Mr. Tyng when they had got out all of my machine they could get out. I did not go to the wreck again after receiving that notice. Mr. Tyng asked me to go down and receive it on the beach. I consulted a friend and he told me not to touch it. Mr. Tyng then had the machinery conveyed to a public store-house. It was a good dry store-house. I cannot say how soon after it was placed in store before I saw it, but I suppose within a month, because I was in the country going backward & forth attending to my duties.

What was saved of it was laid up in a pile in the corner. I went there one day with the intention of looking it through. I had two men with me. I did not go through it at all, because I was convinced that it would be of no use to overhaul a pack of old iron. I noticed that a great many of the pieces were broken, the racks, governor, cylinder, & many other pieces that I can't recollect without referring to my list. The condition of that which was saved I considered perfectly spoiled by rust and breakage. It was rusted so bad that I did not think it worth
67 while to handle it. The pieces that were there could not have been set up and made a perfect machine, because it would be impossible to re-adjust the numerous pieces, because they would have to be returned and refitted, and then they would be too small and too weak, and they would no longer fit in their respective places. It was so badly rusted that all the bright-work would have to be returned. By supplying the broken & and missing pieces you could not have made a perfect machine. None of the pieces that were there could have been used as they were in constructing a new machine. There is a large machine-shop in Havana, belonging to an American family. They said that they could not take those pieces and make the machine anew. The framing could be remelted. The framing is of cast iron. I would rather make a new machine than to attempt to repair that one, there were so many pieces missing. It could not have been repaired. When complete the machinery consisted of one complete sugar-packing machine and three extra truck-irons. These truck-irons were for machines that had
68 gone out the year before. The machine proper had three sets of truck-irons with it, that is, connected with it. The whole thing lay in a pile and you could not tell one truck-iron from another. The axle-trees for the truck-irons are turned and fitted on the end; they were very much rusted and most of them bent. They were all twisted up in a snarl. I speak of all the truck-irons that laid there. They could not

have been used in the condition that they were in; they would have had to be returned, which would have spoiled them for that use. Mr. Tyng tried his best to get me to take the machinery, but I declined. I don't think the rust would increase while the machinery was in a dry place, because on cast-iron that part that the scale is not taken off by turning, filing, or planing, the water has very little effect on it. The turned parts will rust and scale.

The same witness, sworn as above, then cross-examined on the part of the defendants, doth depose and say as follows:

I served an apprenticeship of five years at Hewes & Phillips'
69 machine shop, in New Jersey, which was five years' loss to me, because I might have made a great deal more money employed in some other business. I have had these sugar-packing machines made at Watts, Campbell & Co.'s machine-shop, at Newark, New Jersey. I believe when I first commenced to make them, there were a few made at Hewes & Phillips' machine-shop. I never have manufactured them myself. I am the inventor and patentee. The patent is dated about June, 1864. The trucks are included in the patent. After getting through my apprenticeship, which ended in July, 1851, I remained with Hewes & Phillips as a jou'neyman machinist, putting up machines for them, for about one month. Since then I have been employed in Havana as engineer for a gentleman named Herrera, as practical engineer to attend to all the machinery on a sugar-plantation. There are two sizes of these packing-machines. There is only one size in use now. This one is the largest size and moved by steam-power. The first ones made were moved by hand. They were small ones, and the use
70 of them is discontinued. The bill of lading is still in my possession. I think I have one home. (The bill of lading was produced and annexed to witness' deposition, it being marked "A, E. L. O., U. S. com'r, Oct. 19, 1869.")

I did not take the property because it was no use to me. Mourgue & Co., importers of machinery from Paris and Belgium, at Havana, advised me not to take the machinery.

1. Q. Why did you discontinue overhauling it?

A. Because I was convinced that it was labor in vain, because it was so badly damaged.

2. Q. When you began to examine had you heard that the company would not pay the insurance?

A. I don't think I had. I did not hear it before I had discontinued my examination.

3. Q. Were you not advised that to receive it, or even to examine it, might prejudice your claim for the insurance?

A. I don't recollect that I was.

4. Q. Had that motive nothing to do with your conclusion not to receive it or to examine it?

A. No, sir.

5. Q. What did you mean by saying on the direct-examination
71 in that connection, "When I found the company was not going to pay."

A. I did not know, positively, until some time after I arrived here, which was some time in June, 1868, that the company was not going to pay.

6. Q. You say that you found many pieces that were broken. Did you not find many more that were not broken?

A. I saw a number of pieces that were not broken. I could not say whether a majority of the pieces were whole or broken.

7. Q. How much of the machinery was polished work?
A. From about one-third to a half.
8. Q. Were any of the pieces, which were not polished work, broken?
A. Yes, sir; I saw some of them broken. I did not count them. I saw them laying around on the floor.
9. Q. Were the pieces that were not polished damaged materially by rust?
A. Yes, sir; by being in the water.
10. Q. Were not all the parts not polished saved?
A. They were not.
11. Q. Which of them were not?
A. I cannot particularize.
12. Q. How do you know, then, that any of the parts were missing?
72 A. I knew by the bulk of iron laying on the floor that many of them were missing.
13. Q. Do you mean to say that the pieces not polished, which were saved without breakage, could not have been worked into new machinery at the place of manufacture?
A. Yes; I do.
14. Q. Do you mean to say that no use could have been made of them at the place of manufacture?
A. They could not, without re-melting.
15. Q. Why not?
A. Because the moment we would commence to turn an axle down, or plane off any of the framing, it would disarrange the distances, and disorganize the combination entirely.
16. Q. Do you mean to say that nothing of what was saved could be used again at the factory where it was made?
A. Yes, I do; without making an entire new set of patterns.
17. Q. What would that cost?
A. It would cost more to make new patterns than to make a new machine.
18. Q. Which parts of the machine were painted?
A. All the bright work, when it leaves the shop, is tallowed.
73 The cast-iron work, painted what they call lead color, the same as is done with all machinery that is to be shipped.
19. Q. Which of the cast-iron pieces did you see injured by rust?
A. The salt-water had eaten the paint off of all of them, and had rusted the iron in every part. I discovered that when the machinery lay on the beach.
20. Q. If it lay all in a heap, so that you could not tell which pieces were broken, how could you tell that every piece was rusted all over?
A. All the pieces that I saw were rusted. I saw the front frame, back frame, and the fly-wheel, being the most prominent pieces, and some small pieces laying around that I can't enumerate now.
21. Q. Was the machine perfect without the trucks which were contained in the three separate boxes?
A. Yes, sir; it was.
22. Q. Did you examine those three trucks, or either of them?
A. I could not tell, of the pieces which were remaining, which trucks they belonged to
23. Q. Did you examine any of the trucks saved?
Q. A. I merely looked at the pile of iron as it lay there.
24. Q. Can you say whether any, and if so, which, of the trucks was broken?

Q. A. The truck-irons were broken, & I could not tell whether they belonged to the machine proper, or to the extra trucks.

74 (A paper being here shown him, witness said thereon:)

It is in my handwriting, with the exception of Weeks & Foster, which is attached to it.

(The paper in question was marked "B, E. L. O., U. S. com'r, Oct. 19, 1869," and annexed to the deposition of witness.)

Weeks & Foster are the attorneys I employed to prosecute this claim. I furnished them with the paper marked "B," as a statement of the condition of the machine as dischar'ed at Havana. The document marked "B" contains a statement of all the parts in the truck-irons & in the machine as shipped, complete, and the memoranda in the margin refer to the condition when discharged on the beach at Havana.

25. Q. How did you get the information for making the memoranda in the margin?

A. Principally from memory.

26. Q. Have you not said, on your examination, to-day, that you did not examine the parts of the machinery particularly?

A. I did not examine the machinery in the store-house, as it laid in a pile. I did on the beach.

27. Q. Can you now specify, more particularly than is done in this document, how many and which of the pieces were lost?

A. No. I cannot.

28. Q. Or which of the pieces were broken, except as mentioned here?

75 A. No.

29. Q. Or which of the pieces were rusted, except as mentioned here?

A. No.

30. Q. Were not the pieces lost mostly small pieces?

A. Yes, sir; they were.

31. Q. How were they lost?

A. The small pieces were shipped in boxes in the cases, and when the vessel and the boxes went to pieces together, the small pieces could not be recovered. If they could have got the boxes out entire, the small pieces would not have been lost.

JAMES FOGARTY.

"A," *E. L. O., U. S. com'r, Oct. 19th*, 1869.

Shipped in good order and well-conditioned, by Watts, Campbell, & Co., on board the Br. bark called the Ella Adelle, whereof Alexander is master for this voyage, now lying in the port of New York, and bound for Havana, to say: Eight pieces and eight boxes machinery, being marked and numbered as in the margin, and are to be delivered in the like good order and condition, at the aforesaid port of Habana, (the dangers of the seas only excepted,) unto James Fogarty, esq., or to his assigns, he or they paying freight for the said fifty-one $\frac{09}{100}$ dollars, gold, with 5% primage and average accustomed.

J. F., 13 pieces.
C. O. R., 2 do.
N. D. 1 do.

[10 c. U. S. rev. stamp, cancelled.]

76 In witness whereof, the master or purser of the said vessel hath affirmed to bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Dated in New York the day of Oct, 1867.

For the captain:

M. TRIYILLY.

"*B*," *E. L. O., U. S. com'r, Oct.* 19, 1867.

[Rec'd & ans'd, 11 Aug., J. A. P.]

58 WALL STREET, NEW YORK, *August* 10, '68.

JOHN A. PARKER, Esq.,
Pres't Great Western Ins. Co.

DEAR SIR: Communications between your office & ours seem dilatory, as your respects of 3d instant was not received until Thursday. We have, at considerable trouble, obtained for you a written list of the separate pieces, by name, composing the machine, and also a list of the other machinery. The information is all in the possession of your agent, Tyng, who can inform you precisely what pieces were lost, & what pieces in a damaged & broken condition he landed & stored. We have made inquiries, and have named on these lists the result of those inquiries. If you will examine the proofs already furnished, we are
77 told that you will find the value of the articles insured there given, & also the value of the pieces which the underwriters' agent landed & stored. That value was, we think, about fifty dollars, the value of the machinery insured being 2,250$, the amount of the insurance we presume.

Resp'y,

WEEKS & FOSTER.

TRUCK-IRONS.

Several lost	24 axles 42 in. long 1¼ iron.
Several lost	48 wheels 8 " diameter.
Several lost	48 cast-iron boxes.
All lost	96 bolts for "
Several lost	27 pieces cast-iron racks
Lost	108 wood screws ½ × 3 for same.
Lost	12 ¾ × 8¼ bolts with nuts.
Bent & broken	3 square-threaded screws.
Rusted	3 nuts flanged for "
Some lost	3 wrought-iron handles for the threaded screws.
Several lost	3 swivels.
Several lost	6 cast-iron hoop plates.
Several lost	6 " " angle-iron.
Several lost	9 " " steps.
Lost	18 bolts ½ × 5.
Several lost	12 hook clamps brass nuts with square thread.
Several lost	3 round " " " " "

Besides the truck-irons usually sent with machine there were
78 three extra sets of truck-irons and one indicator; these truck-irons were in great part also lost & destroyed & the indicator was lost.

B, E. L. O., U. S. com'r, Oct. 19, 1869.

List of pieces composing 1 *sugar-packing machine.*

Broken	front lower frame.
Broken	back " "
Broken	top front "
Bolts broken out	" back "

Bolts broken		engine-frame.
Bolts broken		top cross-tie.
Bolts broken		bottom "
Broken		pump brackett and pump.
Rusted		4 rolls turned and polished.
Rusted		4 crown-wheels.
Rusted		1 spur-wheel.
Rusted		1 fly-wheel.
Rusted		1 pinion to drive spur-wheel.
Spoiled & broken		8 Babbitt-metal bearings.
Several lost		10 pounder feet.
Several lost		10 straps—3 fly, 3½ face.
Several lost		10 caps for pipes of pounder.
Several lost		20 pipes 1¼.
Several lost		10 stay-rods for pounder.
Several lost		20 jam nuts " "
Several lost		10 plates for caps " (B, E. L. O,) U. S. com'r, Oct. 19th, 1869.
79	All lost	10 ⅝ bolts for caps.
	Several lost	10 plates for pounder feet.
Several lost		10 ⅝ bolts " " "
Lost		1 check-valve 1¼, for pump.
Lost		1 1¼ lock " "
Lost		2 pair flanges " "
Lost		1 connecting-rod " "
Lost		1 plunger " "
Lost		2 anchor-bolts " "
Lost		6 anchor-bolts for machine proper.
One lost		2 tripper-bars with levers.
Half lost		10 toes keyed on tripper-bars.
Lost		2 steadying-bars.
Some lost		10 ½-moon dogs, moveable.
Several lost		10 ½-moon dogs, stationary.
Lost		3 pedestals for tripper-bars.
Several lost		6 " " stationary "
Several lost		10 wrough-iron levers.
Several lost		10 weights for "
Lost		2 connecting-rods for tripper-bars, with teeth.
Lost		2 plain guides for connecting-rods.
Lost		1 shaft for tripper-bar motions.
Lost		2 pedestals " " "
Lost		2 pinions " " "
Lost		1 sexton " " "
Rusted & bent		1 shaft with two crank-handles and one pinion to give in secton.
Lost		1 steel shaft with 2 handles and 1 pall.
Lost		1 moveable collor for do. with set bolt.
	Lost	1 crank-shaft pinion of truck-moving gear.
80	Lost	2 handles for truck-moving gear.
	Lost	2 wrought-iron studs, " "
Rusted		1 pinion.
Lost		1 bevel-wheel.
Lost		1 stud.
Lost		1 tightner with adjustable-plate.
Lost		1 shaft for pinion of truck.

Lost		1 pinion " same.
Lost		3 boxes for same.
Lost		1 chain " "
Lost		2 grooved wheels.
Lost		1 latch to ungear.
Rusted & broken to pieces		1 Pickering governor.
Lost		1 governor stand.
Lost		1 fork lever for governor.
Lost		1 straight " " "
Lost		1 connecting-rod, downwards.
Lost		1 belt crank below.
Lost		1 stud " "
Lost		1 connecting-rod out to throttle.
Bent & bolts broken		1 steam oscillating cylinder.
Lost		1 angle-valve to give steam to same.
Rusted & broken		1 stub end to connect piston-rod to crank-pin.
Rusted & broken		1 piston-rod of steel.
Rusted & broken		1 piston with brass rings and steel springs.
Lost		1 valve, motion complete with all its parts. (B, E. L. O., U. S. com'r, Oct. 19, 1869.)
	Lost	1 double crank to give motion to valve.
81	Lost	1 connecting-rod " " " " "
	Lost	1 yoke to steady steam-pipe.
Lost		1 " " " exhaust "
Broken & rusted		1 wrought-iron cross-piece to steady angle-valve.
Bolts & nuts lost		with two double-threaded bolts and nuts.
Lost		1 brass elbow for exhaust with flanges & bolts.
Rusted		1 crank-shaft.
Rusted		1 fly-wheel.
Rusted		2 bolts to hold fly-wheel to pinion.
Lost		bolts.
Lost		54 $\frac{3}{4}$ bolts
Lost		4 1$\frac{3}{4}$ "
Lost		4 1 " with 8 jam-nuts.
Lost		36 $\frac{5}{8}$ "
Lost		8 $\frac{7}{8}$ "
Lost		14 $\frac{1}{2}$ "
Lost		4 $\frac{3}{4}$ steel bolts with jam-nuts.
Lost		8 1-in. steel bolts with jam-nuts.
Lost		10 $\frac{7}{8}$ " "
Lost		8 $\frac{3}{4}$ "
Lost		30 $\frac{3}{4}$ "
Lost		8 $\frac{3}{4}$ "
Lost		10 steadying-pins, tapered.

The plaintiff, further to maintain the issues on his part, called as a witness CHARLES D. TYNG, who, being duly sworn, testified as follows:

82 I reside at Havana. In Oct., 1867, I was agent of the New York underwriters, at Havana, for the Great Western Insurance Company. I had a verbal appointment, which was afterwards made in writing. I had been agent for the underwriters generally for about 4 or 5 years. I remember the loss of the Ella Adele in Oct., 1867. I saw her

daily and nightly after she was lost. She was thrown on the rocks, broadside on, near the Punta Fort. She bilged a few hours after striking, and the tide ebbed and flowed in her before I was able to begin to save anything. First, as she was laboring very heavily, I had the masts cut away to prevent their breaking her up. A day or two afterwards, I forget exactly when, I commenced getting what cargo I could out of the hatches. I cut a hole in her side and got some cargo out of that. I came across sugar-packing machinery and a great deal other machinery. It was found on the bottom, covered with water. At last the vessel was thrown higher up, and then portions of it would be out of water at low tide. The vessel was entirely broken up. Many things of the cargo were lost in deep water. The wreck was sold as fire-wood. It was sold and afterwards used as fire-wood. I did not know at the time whether the
83 machinery was complete or not. I went on saving piece after piece as it came up, and when I had saved all I could I saw Mr. Fogarty, who examined what I had saved and informed me that the machine was not complete. The parts that were saved were first put on the beach and afterwards removed to a store-house called "The Chorro." As it was fished up it was very much rusted and the polished surfaces were badly eaten into. I think that, on the afternoon of the third day, I was able to begin to get out cargo, and I think it was about one month before I finished getting out cargo, and during all that time the water ebbed and flowed in the ship. There were a great many days I could not work at all. I think Mr. Fogarty took a memorandum of the parts taken out. I did not assist. I don't think I got out a single box whole. I think there was one box that seemed to have wheels in that we had to break to get the things out. I suppose the cargo would have been delivered on lighters. The place of delivery was inside the port, which was about a mile up the harbor from where the wreck lay.

84 On being cross-examined by defendant's counsel, witness said:

I have been in Havana, off and on, some thirty years. I have been regularly there for the past 12 or 14 years. I was here in January, 1868.

Q. Do you recollect reporting at the time, to the company, that this machinery of Mr. Fogarty's by the bark Ella Adele was almost entirely saved?

A. I do; but I referred to the bulk of iron saved. Mr. Fogarty admitted that there was nearly half of the iron saved. The machinery was all iron. I should think that over half of the iron was saved. I can't say that nearly all was saved.

Q. Can you also state at what expense of salvage and of moving it was finally placed in store at Havana?

A. I cannot, except by reference to a letter. My impression, in January, 1868, was, that the expense pro rata of the salvage was about 26 dollars, gold, and about 34 dollars, gold, for the moving or transportation to the city of Havana, and one month's storage. I paid the charges upon it. I know that was about the amount, for I paid it. At the time it reached store in Havana Mr. J. Fogerty was in Havana, and was in communication with me.

85 Q. You say you were agent of the defendant at that time. What instructions had the defendant given you in respect to this machinery up to the time it was landed and stored?

A. It was all in letters from the company in New York, and those letters are in Havana.

Q. When you say the polished surfaces were badly eaten into, what do you mean?

A. I mean that those surfaces were chiefly fitted to other parts and would have to be turned down or smoothed off to get an even surface for the bearings of those other parts that were to be fitted to them. Spots as large as a silver dollar were eaten into by rust. The polished surface was rusted off.

Q. This machinery was made for use in the manufacture of sugar, was it not?

A. Not for the manufacture, but for the packing of the sugar after it was made. There are no establishments in Havana where these machines are made or could be repaired. I satisfied myself of that by enquiries there, not only by people there, but by agents of the West Point Foundry. I took competent advice on the subject.

Q. Did you also find out what was the nearest point to which the parts saved could be sent to be repaired and the missing
86 portions replaced?

A. I did, and found that the portions saved, with the exception of a few pieces, would have to be sent to the original machine-shop or machine-shops where they were made, and that the missing pieces would have to be furnished from the same foundry from where the last ones had been made. I did not ascertain what would have been the freight on it back to New York. It would have exceeded the outward freight on the whole.

Q. How much would the freight on the parts saved back exceed the freight on the whole out?

A. I cannot tell. This stuff still remains in the store at Havana. An opportunity was given Mr. Fogarty when it was landed and stored to take possession of it. I asked him to do it.

On his redirect examination the witness said:

Q. Did you at that time offer the entire shipment, or only those portions that were saved?

A. I only offered that which I had to offer. The iron was all rusted. The exception I referred to in one of my former answers were some weights that were not materially damaged. The truck-irons, as
87 I understood, are parts of the machine. Some truck-irons were saved; but whether they were extra ones or original ones I cannot say, or whether any complete set was saved I cannot say.

CHARLES D. TYNG.

The plaintiff, further to maintain the issues on his part, called as a witnes LOUIS MCCLELLAN, who, being duly sworn, testified as follows:

I am a native of . For the last twelve years I have resided in Cuba. I am a machinist and engineer. I am acquainted with the Fogarty packing-machine. I have had charge of three of them in Cuba.

Q. You have heard the testimony of Mr. Tyng in reference to the parts of the machine saved and the parts lost, and the condition of those saved. State whether, in your opinion, that machine could have been used as it was landed on the beach.

A. It could not have been used; it was not all there, and could not have been set up. On any machinery or iron salt-water corrodes more than fresh. The polished work could not have been returned and used in that machine. It would have reduced it in size.

88 Q. From what Mr. Tyng has stated, what would have been necessary to have constructed a new machine out of what was saved?

A. I cannot answer, because it could not have been used. Of course all that was lost would have to be supplied, and the parts that were rusted would also have to be supplied. It is possible that some of the parts that were saved might have been used in building another machine, but then it would not have been this machine. This was the only way those parts could have been used. I went to the store-house where the machinery was stored. One half or two-thirds of the weight of the iron might have been there, but none of the small work was there. I think one large piece of the framing was missing. I think none of the trucks were complete; there were some there. Those pieces that were there were in a damaged and broken condition.

Being cross-examined by counsel for defendants, witness said:

This was a complicated machine. I think it is unusually so. The absence of a few small pieces to any machine would prevent its
89 being set up and used, as in a steam-engine the loss of a piece he size of my two fingers would prevent its being used.

LOUIS McLELLAN.

Subscribed and sworn to before me this 20th day of August, 1869.

EDWARD L. OWEN.

The plaintiff, further to maintain the issues on his part, called as a witness WILLIAM WATTS, who, being duly sworn, testified as follows:

"I reside in Newark; am of the firm of Watts, Campbell & Co., machinists and engineers; knew this sugar-packing machine; it was made at my establishment; the machine weighed 7,000 lbs. I made this machine and shipped it. It consisted of 1 sugar-packer and three trucks. The sugar-packer was a machine for packing sugar with the iron-work for to hold the boxes while being packed; the iron-work for the 3 trucks was part of the machine. There was also the iron-work for 3 extra trucks. I was in Cuba in March and April after loss, and saw what was saved. I did not make th'rough examination of it. Many of the parts were broken, and many were missing. I made no memorandum of what I saw. The machine could not be restored. The parts that were left were broken and rusted, so they could not be used again. The
90 wheels to the trucks were, some of them, missing. The axles were saved, but it would have cost more to arrange them with new wheels than to have made new ones. The axles were turned for the journals and the wheels. What I saw was worth nothing except as old iron. There was $\frac{2}{3}$ in weight left."

Being cross-examined, witness said:

There was not over 8,000 or 9,000 lbs. in the store-house. The parts were all in pieces. There were pieces without which it would have been useless as a machine.

And thereupon the plaintiff having rested his case, the defendant's counsel requested the court to direct a verdict for the defendant on the grounds:

1st. That the insurance of the plaintiff's machinery being, by the terms of the insurance, "free from particular average," and a portion of the said machinery insured having been saved and arrived at the port of destination, the loss was not total, and the defendants are not liable therefor within the terms of the policy.

2d. That the evidence on the part of the plaintiff will not sustain a finding by the jury that the loss was total.

But the learned court denied the motion and refused to direct
91 a verdict for the defendants; to which ruling the defendant's counsel duly excepted.

The defendant's counsel thereupon, to maintain the issues on their part, produced and read in evidence the plaintiff's original application for the insurance, signed by F. C. Uzquierdo, the insured named in the policy. The application is as follows:

GREAT WESTERN INSURANCE COMPANY: [34–46,

Value $2,250. On board the Bark Ella Adele at and from New York to Havana. Bill of lading dated. Time of sailing. Free from particular average. Master's name. Where built 55 When built. Tonnage. When last coppered. When last inspected Present condition. 1125 563 3938 Rate. Premium.

Enter on open policy of F. C. Yzquierdo, No. 27315. $2,250 on machinery shipped by Watts, Campbell & Co.

Subject to average as per memorandum in the policy or the printed tariff of this company, unless otherwise agreed upon.

Warranted by the assured free from loss on account of capture, seizure, detention or destruction by or arising from any belligerent nation, or from any seceding or revolting State or States of this Union, or from any guerilla party, or by or from any officer, civil or military, or other persons claiming to act in their name or under their authority or in their behalf.

The amount insured by this application is expressed in the paper currency of the United States, and, in case of loss, such loss is to be paid in that currency at the denomination value. Proof of loss to be authenticated by the agent of the company, if there be one at the place where such proofs are taken. To be approved of in accordance with the terms of the policy. Shipments by vessels carrying grain are warranted by the assured not to proceed to sea without the written approval of loading by the grain-inspector appointed by the New York board of underwriters.

New York, September 26, 1867.

(Signed) F. C. YZQUIERDO.
P. p, RAFL. DE C. POLAMINO.

Approved.

92 The defendant's counsel further produced and read in evidence the preliminary proofs presented to the defendant on the part of the plaintiff, after loss and before action brought, consisting of the bill of lading, invoice of the merchandize, and the protest signed by the master and certain of the crew of the Ella Adele. The bill of lading is as follows:

Shipped in good order and condition, by Watts, Campbell & Co., on board the bark called the Ella Adele, whereof Alexander is master for this voyage, now lying at the port of New York, and bound for Havana Cuba, to say:

Weight 12,774 lbs. Freight 51,09 2,55 $ 53,64

Eight pieces and five boxes marked J. E., Havana. Two boxes marked C. O. R. Yngenio, San Francisco. One box marked N. D. Yngenio, Santa Barbara, and composing one sugar-packer and three trucks, being marked and numbered as in the margin; and are to be delivered in the like good order and well conditioned at the aforesaid port of Havana (the dangers of the seas only excepted) unto James Fogarty, or order, or to his assigns, he or they paying freight for the said machinery fifty-one $\frac{00}{100}$ dollars, with 5 % primage, and

Weight and contents unknown; not accountable for leakage, breakage, or rust.

93 average accustomed. In witness whereof the master or purser of the said vessel hath affirmed to four bills of lading, all of this tenor and date; one of which being accomplished, the others to stand void.

Dated in New York, the nineteenth day of September, 1867.

For the captain:

(Signed) M. FRUJILLO.

The invoice is as follows:

Invoice of five boxes, containing one sugar-packing machine, and three boxes with 3 trucks, shipped by the undersigned on board the bark Ella Adele, Alexander master, and consigned to James Fogarty, Havana.

J. F.	5 boxes, containing one sugar-packing machine		1,800 00
C. O. R. (2)	two boxes, with two trucks		150 00
N. D. (1)	one box, with one truck		20 00
			2,070 00

CHARGES.

Insurance on $2,250, @ 1¾ p. %	39 38	
Policy	1 25	
		40 63
		2,110 63
Commission on $2,110.63, 2½ p. %		52 76
		$2,163 39

E. & O. E.

New York, September 20, 1867.

(Signed) F. C. YZQUIERDO.

94 The protest is as follows:

HAVANA, 26*th October*, 1867.

Before J. V. Crawford, H. B. M. consul in Cuba, personally appeared August Alexander, the master, W'm R. Johnson, the mate, W'm Fischer and Hays Tannier, seamen, all of Br. bark Ella Adela, of Nassau, N. P.; set sail and departed from N. Y.; Oct., '67, for Havana; that nothing particular occurred up to the 18th and the day following, during which they experienced strong gales, with very heavy seas, the vessel rolling considerably and making a great deal of water, besides shipping large quantities of water on deck; pumps carefully attended throughout; that, the weather moderating, on the 20th they made sail accordingly, and passed through "The Hole in the Wall;" next day passed Styrrup Key, and on Tuesday, the 22d, sighted the pass of Matanzas, the weather being very blustery, with strong wind from the northwestward, accompanied by heavy squalls of rain. On the 23d, at 4 p. m., the wind increasing, with a heavy cross-sea running, they steered right toward the entrance of the harbor of Havana, making all ready for anchoring, and keeping the halyards and sheets clear for running; that when

95 close in, at 6 p. m., the weather looking still more threatening and the seaincreasing, they took in all light sails; but it being too late to enter the harbor, in endeavoring to haul off shore they were suddenly struck by a violent squall, which drove the ship ashore on the rocks, close to the "Punta Battery," the ship striking very heavily and immediately bilging, and the sea making a clear breach over her; that at 9 p. m. the master ordered a hawser to be got ashore, which was done by securing one end of it to the fort and the other to the mizzen-mast, hove well tight, by which means the crew and their effects were enabled to reach the shore; that the master and the 2 mates remained on board until 3 a. m. of Thursday, the 24th, when, finding that the vessel had 8 feet of water in the hold, and that there was no hope of saving her, and the way she was thumping rendering it unsafe for them, they were obliged to leave her by the same means as the rest of the crew; that at daylight the master returned on board, and found the ship full of water and beginning to break up, a strong gale still blowing, and the sea being in such a state as to render any assistance from shore
96 entirely out of the question; that the master then reported himself, with his crew, at this consulate, and duly noted his protest.

(Signed) A. ALEXANDER.
W'M R. JOHNSON.
W'M FISCHER.
HAIS TANNER.

Before—

(Signed) JOHN V. CRAWFORD,
Acting Consul-General in Cuba.

And thereupon the defendant's counsel rested, and again requested the court to direct a verdict for the defendants on the same grounds upon which his original motion to that effect was based, and also because the insurance not being upon "one sugar-packing machine" and "three trucks," but simply upon "machinery" shipped; and a large part of the machinery so shipped and insured having arrived at the port of destination, the loss was not total, and the defendant, by the terms of the policy, is not liable; but the learned court denied the motion, and refused to direct a verdict for the defendants; and to such ruling the de-
97 fendant's counsel duly excepted. The counsel for the defendant then requested the court to charge and direct the jury that, upon the evidence, the defendant was entitled to a verdict, and that they should so find; but the learned court refused so to charge and instruct the jury; and to such refusal the defendant's counsel duly excepted. The defendant's counsel then requested the court to charge the jury that the defendants would be liable under the policy only for an actual total loss of the subject insured, and not for the constructive total loss thereof, but the learned court refused so to charge; and to such refusal the defendant's counsel excepted.

And thereupon the defendant's counsel requested the court to charge the jury

That if the jury find that a large or any considerable part of the articles insured and shipped was saved and arrived at the port of destination, the loss was not total, and the defendants, having only insured the goods "free from particular average," are entitled to a verdict; but the learned court refused so to charge; and to such refusal the defendant's counsel duly excepted, and further requested the court

98 to charge and instruct the jury that, if any portion of the machinery insured and shipped in the eight boxes mentioned in the invoice and bill of lading, arrived in specie at the port of destination, the loss was not total, and the defendants are not liable under the policy; but the learned court refused so to charge; and to such refusal the defendant's counsel duly excepted.

The defendants' counsel further requested the court to charge and instruct the jury that, if the operation of the perils of the sea upon the machinery did not alter its nature or character, but if any part of it, though damaged thereby, arrived at the port of destination at all in the form of pieces or parts of machinery of the character shipped, the loss was not total, and the defendants are not liable under the policy; but the learned court refused so to charge; and to such refusal the defendant's counsel duly excepted.

The defendant's counsel further requested the court to charge and instruct the jury that there is no sufficient evidence to sustain a finding on their part that no piece of the machinery shipped arrived at

99 the port of destination as a piece of machinery, or in the condition in which it was shipped; but the learned court refused so to charge; and to such refusal the defendant's counsel excepted.

The defendant's counsel further requested the court to charge and instruct the jury that, for damage from sea perils or other perils enumerated in the policy which happened on the voyage to the machinery insured, or any part thereof, but which did not result in its total destruction, and prevent the arrival of any part at the port of destination, the defendants are not liable under the policy; but the learned court refused so to charge; and to such refusal the defendant's counsel duly excepted.

And thereupon the learned court charged the jury, among other things, as follows:

That the meaning of the term "free from particular average," used in the policy, was, that the defendants should be liable only for a total loss of the subject insured; that the subject insured was not machines, but machinery, by which *is* generally understood the several parts or

100 portions of machines adapted and fitted to be put together so as to constitute a machine—in this case a sugar-packing machine; and, applying the rule of law as to what constitutes a total loss to this particular subject insured, the jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition so that it could have been used with corresponding or connecting pieces, had they also arrived in good condition. In that case the plaintiffs could not recover, as the loss would not be total; but that, if every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use on being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured, as machinery, although the material itself might still exist; and if they so found, they would find a verdict for the plaintiff for the sum named in the policy, with interest from the tenth day of September, 1868.

And thereupon the defendant's counsel excepted to the following portions of the charge, separately and specifically:

To the charge that the subject insured was not machines, but machinery, by which *is* generally understood the several parts or

101 portions of machines adapted and fitted to be put together so as to constitute a machine—in this case a sugar-packing machine.

To the charge that the jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition,

so that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition.

To the charge that if every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use, on being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured as machinery, although the material itself might still exist.

To the charge that if they found that every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use on being supplied with its corresponding or connecting pieces, although the material itself might still exist, they would find a verdict for the plaintiff for the sum named in the policy, with interest from the tenth day of September, 1868.

102 And thereupon the jury, having considered of their verdict, did find for the plaintiff for the sum of two thousand six hundred and ten dollars and ninety-three cents.

And afterwards the said defendants duly moved in the said circuit court, before the said judge, for a new trial, and to set aside the said verdict upon the said exceptions; which motion was, after argument, denied.

And inasmuch as the said several matters, so produced and given in evidence on the part of the plaintiff and defendants, respectively, and the said requests to charge, and refusals thereto, and the said charge and exceptions thereto, do not appear by the record of the verdict aforesaid, the said counsel for the defendants did propose these his exceptions in writing to the said refusals to charge, and to the said several portions of said charge, and requested the said justice to put his seal to this bill of exceptions containing the said several matters so produced and given in evidence, and the said charge and exceptions as aforesaid, according to the form of the statute in such case made and provided.

And thereupon the said justice of the said court, at the request of the said counsel for the defendants, did put his seal to this bill of exceptions, pursuant to the said statute and the rules and practice of the said court, on the twenty-fourth day of September, in the year

103 one thousand eight hundred and seventy-two, as of the 29th of December, 1870.

SAM'L BLATCHFORD. [L. S.]

We hereby consent to the settlement of above bill of exceptions.

OWEN, NASH & GRAY,
Att'ys for Pl'ff.

A. Cargo.] (Copy.) [No. 27315.

Sum insured, $8,000. By the Great Western Insurance Company, a stock marine insurance company incorporated by the State of New York, (F. C. Yzquierdo, on account of whom it may concern, in case of loss to be paid to him,) do make insurance and cause to be insured, lost or not lost, at and from ports & places to ports & places, on merchandise, to cover such risks as may be approved and endorsed hereon, the good vessel or vessels, upon all kinds of lawful goods and merchandises, laden or to be laden on board, whereof is master for this present

voyage , or whoever else shall go for master in the said vessel.

Beginning the adventure upon the said goods and merchandises from and immediately following the loading thereof on board of the said vessel, at aforesaid, and so shall continue and endure until the said goods and merchandises shall be safely landed at aforesaid. And it shall and may be lawful for the said vessel, in her voyage, to proceed and sail to, touch and stay at, any ports or places, if thereunto obliged by stress of weather or other unavoidable accident, without prejudice to this insurance. The said goods and merchandises hereby insured are valued at invoice cost & 10 % unless otherwise agreed upon.

The amount insured by this policy is expressed in the paper currency of the United States; and in case of loss, such loss to be paid in that currency at the denominational value.

Touching the adventures and perils which the said Great Western Insurance Company is contented to bear and takes upon itself in this voyage, they are of the seas, winds, waves, rocks, sands, shoals, and coasts, collisions and sinking at sea, fires, jettisons, loss by pirates, rovers, or assailing thieves, barratry of the master and mariners, and all other losses and misfortunes that have or shall come to the hurt, detriment, or damage of the said goods and merchandises, or any part thereof, occasioned by sea perils; subject, however, to such clauses, terms, and rates of average as are contained in the memorandum in this policy, unless otherwise agreed upon in writing. And in case of any loss or misfortune, shall be lawful and necessary to and for the assured, factors, servants, and assigns, to sue, labor, and travel for in and about the defence, safeguard, and recovery of the said goods and merchandises, or any part thereof, without prejudice to this insurance; nor shall the acts of the insured or insurers, in recovering, saving, and preserving the property insured, in case of disaster, be considered a waiver or an acceptance of an abandonment, to the charges whereof the said insurance company will contribute according to the rate and quantity of the sum herein insured, having been paid the consideration for this insurance by the assured or assigns, at and after the nominal rate of two & one-half per cent., the premium on each risk to be fixed at the time of endorsement, with additions and deductions to conform to the rates of the company when the character of the vessel and time of sailing are known.

And in case of loss, such loss to be paid in thirty days after proof of loss and proof of interest in the said , (the amount of any note or notes given this company for premiums, if unpaid, and all other indebtedness being first deducted;) but no partial loss or particular average shall in any case be paid unless amounting to five per cent.; and it is understood that when goods are insured in series, claims must also be adjusted in series: Provided always, and it is hereby further agreed, that the company shall not be liable to pay, by reason of general and particular average and total loss, more in the aggregate than the sum hereby in-

Warranted by the assured free from loss or claim on account of capture, seizure, detention, or destruction by or arising from any belligerent nation, or from any seceding or revolting State or States of this Union, or from any guerilla party, or by or from any officer, civil or military, or other persons claiming to act in their name or under their authority, or in their behalf.

Premium.... $200
Policy .....
$200

sured; and that if the said assured shall have made any other assurance upon the premises aforesaid prior in date to this policy, then the said Great Western Insurance Company shall be answerable only for so much as the amount of such prior assurance may be deficient towards fully covering the premises hereby assured; and the said Great Western Insurance Company shall return the premium upon so much of the sum by them assured as they shall be by such prior assurance exonerated from. And in case of any insurance upon the said premises subsequent in date to this policy, the said Great Western Insurance Company shall, nevertheless, be answerable for the full extent of the sum by them subscribed hereto, without right to claim contribution from such subsequent assurers; and shall accordingly be entitled to retain the premium by them received in the same manner as if no such subsequent assurance had been made. It is also agreed that the property be warranted by the assured, free from any charge, damage, or loss which may arise in consequence of a seizure or detention, for or on account of any illicit or prohibited trade, or any trade in articles contraband of war, warranted by the assured not to abandon in case of blockade, and free from any loss or expense arising from capture, seizure, detention, or blockade, or any attempt thereat, or any of the consequences of the hostilities of nations, notwithstanding anything to the contrary in this policy; but in the event of blockade to be at liberty to proceed to an open port and there end the voyage.

Warranted by the assured, free from damage or injury from dampness, change of flavor, or being spotted, discolored, musty or mouldy, except caused by actual contact of sea water with the articles damaged, occasioned by sea perils. In case of partial loss by sea damage to dry goods, cutlery, or other hardware, the loss shall be ascertained by a separation and sale of the portion only of the contents of the packages so damaged, and not otherwise; and the same practice shall obtain as to all other merchandise as far as practicable. Not liable for stains or damage to the casks or other packages containing liquors or wet goods of any kind, nor for leakage on molasses or other liquids, unless occassioned by stranding or collision with another vessel; and not liable for general average in consequence of loss on ice cargo. In case of claims for damage on dry goods or hardware exceeding fifteen per cent., the company to have the privilege of settling upon the principle of a salvage loss—paying to the assured the sum insured, with the freight and duties paid thereon.

On risks hence to California, it is agreed that the property insured shall be discharged within thirty days after the arrival of the vessel, otherwise the risk under this policy shall cease. Endorsements valued at the sums insured: Provided they do not vary from the cost more than twenty per cent.; and in case of particular average or damage, the sound value at the port of destination is not to exceed the insured value with the freight added thereto. In case of claims for damage, the examinations at San Francisco are

to be made under the direction of the agent of the company.

No outward shipment from the United States, or coastwise or inland within the same, is to be considered as insured under an open policy until approved and endorsed by this company, unless otherwise agreed upon in writing. Endorsements valued at the same: Provided, however, that in coastwise or inland shipments within the United States they do not vary from the cost more than ten per cent., and the sound value of such shipments at the port or place of destination is not to be deemed to exceed the same per cent. on the purchasing prices at the shipping port.

Cargo on deck is not covered by this policy unless specially endorsed hereon, and in all cases to be free from loss by wet, breakage, leakage, or exposure.

Warranted by the assured that shipments of grain from New York to foreign ports are not to proceed to sea without the certificate of, or the approval of loading by, the grain-inspector appointed by the New York board of underwriters. Proof of loss to be authenticated by the agent of the company, if there be one at the place were such proofs are taken.

On freight risks: It is understood that the vessels are insured in such companies and valued at such amounts as are specified in the respective applications; and in case of omission, the highest valuation under which the vessel is insured in any policy shall be the basis for ascertaining a technical total loss. In case of the actual or technical total loss of the vessel under the insurances upon her, a total loss of the freight to be paid under this insurance; any savings of freight then on board to be for the benefit of the company. But in case the vessel is not totally lost, the liability under this insurance is not to be greater than the actual loss by the disaster of the freight on board.

All approved endorsements on the pass-book given by this company under this policy are to apply in all respects to this policy, the same as if endorsed hereon, and not otherwise. Risks applicable hereto to be reported to this company for endorsement as soon as known to the assured.

MEMORANDUM.—It is also agreed that dried-beef, hams, bacon, fire-crackers, and other fire-works, saltpetre, hops, guano, manures, and other fertilizers, rice, peas, and beans, mats and mat'ing, flax-seed, and seeds of all kinds, bleaching powders, soda-ash, bicarbonate of soda, sal-soda, potash, pearlash, cream of tartar, camphor, burlaps, shoddy, Hessians, floor-cloths, straw goods, gloves, feathers, and all millinery articles; bar, bundle, rod, hoop, sheet, and railroad iron; wire of all kinds, tin-plates, nails, steel, machines and machinery of every description, madder, sumac, wooden, wicker, and willow ware, (manufactured or otherwise,) salt, grain of all kinds, hay, tobacco, Indian meal, fruits, (whether preserved or otherwise,) cheese, dry fish, vegetables and roots, rags, dye-woods of all kinds, mahogany and other woods, hempen yarn, jute, bags, cotton bagging, and other articles used for bags or bagging. pleasure carriages, household furniture and all house-furnishing articles, books, stationery, lumber, house frames, doors, sashes, blinds, and all other building materials, skins and hides, bristles, istle or Tampico grass, musical instruments, looking-glasses, and all other articles that are perishable in their own nature are warranted by the assured free from average, unless general; hemp, flax, tobacco-stems, cassia, (except in boxes,) and oil-cake, free

from average under twenty per cent., unless general; and sugar and bread are warranted by the assured free from average under seven per cent., unless general; coffee in bags or bulk, pepper in bags or bulk, and cassia in boxes free from average under ten per cent., unless general.

On risks from China: Each ten packages of silks or other dry goods, in the order of invoice, subject to separate average. Each interest of $5,000, insured value or less, subject to separate average. If over $5,000 value, each of the following kinds of teas: Imperial, gunpowder, Hyson, Hyson skin, Young Hyson, and black teas; and each $5,000 value thereof in the order of invoice, subject to separate average; and the different excesses over $5,000, subject to average if the damage amount to $250.

If the risks covered shall have begun and terminated before the date of this policy, then there shall be no return of premium on account of such termination of the risk.

In all cases of return of premium, in whole or in part, not less than one-half per cent. upon the sum insured is to be retained by the assurers.

In witness whereof the president or vice-president of the said Great Western Insurance Company have hereunto subscribed his name and the sum insured, and caused the same to be attested by its secretary, in New York, the seventh day of March, one thousand eight hundred and sixty-two.

$8,000, (eight thousand dollars.)

President.

, *Secretary.*

104 Date & entry.	Name of vessel.	To be insured. From—	To—	Description of goods.	Amount of bills.	Amount to be insured.	Rate of premium.	Amount of premium.	Date of approval.	Approved.
Sept. 26.	B'k Ella Adela.	New York.	Havana.	Machinery free from particular average.	.....	2,250	1¼	39 38	Sept. 26.	A. M. N. P.

105 (On back:) No. 27315. 7 March, 1862. Vessel or vessels. Great Western Insurance Co. F. C. Yzquierdo. Ports & places to ports & places. Cargo. $8,000, @ 2½ per cent., $200; policy , —$200. Record, ; folio . John M. Burnett, stationer and printer, 64 Cedar street, N. Y.

106 (Endorsed:) U. S. circuit court S. D. of New York. James Fogarty vs. The Great Western Insurance Comp'y. Bill of exceptions. Evarts, Southmayd & Choate, defendant's attorneys. Filed Sept. 27, 1872.

106 To the honorable the judges of the circuit court of the United States for the southern district of New York, in the second circuit.

The petition of The Great Western Insurance Company, defendant in a certain action brought in this court by James Fogarty against the said The Great Western Insurance Company, respectfully shows that in

said suit there is manifest error in the final judgment rendered in said case, to the prejudice of the defendant.

The said defendant therefore prays for a writ of error to the Supreme Court of the United States, on giving proper security, and that the plaintiff be cited to answer the same.

EVARTS, SOUTHMAYD & CHOATE,
Att'ys for Defendant.

(Endorsed:) U. S. circuit court S. D. of N. Y. James Fogarty v. The Great Western Insurance Company. Petition for writ of error. Evarts, Southmayd & Choate, att'ys for defendant. Filed Oct. 4, 1872.

107 Know all men by these presents that we, The Great Western Insurance Company, John A. Parker and Stephen Allaire, are held and firmly bound unto James Fogarty, in the sum of four thousand five hundred dollars, to be paid to the said James Fogarty, his executors, administrators, or assigns; for the payment of which, well and truly to be made, we bind ourselves, and each of us, our and each of our heirs, executors, administrators, and successors, jointly and severally, firmly by these presents, sealed with our seals, and dated the second day of October, in the year of our Lord one thousand eight hundred and seventy-two.

Whereas The Great Western Insurance Company above named hath prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above-entitled action by the circuit court of the United States for the southern district of New York, in the second circuit:

108 Now, therefore, the condition of this obligation is such, that if the above-named The Great Western Insurance Company shall prosecute said writ of error to effect, and answer all damages and costs which shall be awarded against it therein if it shall fail to make good its plea, then this obligation shall be void; otherwise, the same shall be and remain in full force and effect.

{ SEAL OF THE GREAT WESTERN COMP'Y. }

GREAT WESTERN INS. COMP'Y,
By JOHN A. PARKER, *Pres'd.*
JOHN A. PARKER. [L. S.]
STEPHEN ALLAIRE. [L. S.]

Sealed and delivered, and taken & acknowledged, this 2d day of Oct., 1872, before me.

[L. S.]

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

UNITED STATES OF AMERICA,
Southern Dist. of New York, ss:

John A. Parker & Stephen Allaire, being duly sworn, depose
109 and say, and each for himself says, that he, said Parker, resides in the southern district of New York, and he, said Allaire, resides in the eastern district of New York; that he is worth the sum of nine thousand dollars over and above all his just debts and liabilities.

JOHN A. PARKER.
STEPHEN ALLAIRE.

Sworn to this 2d day of October, A. D. 1872, before me.

EDWARD L. OWEN,
U. S. Commissioner for the Southern Dist. of New York.

The foregoing bond is hereby approved as to form and amount.
New York, October 2, 1872.

OWEN, NASH, & GRAY,
Pl'ff's Att'ys.

(Endorsed:) United States Supreme Court. The Great Western Insurance Company, plaintiff in error, vs. James Fogarty, def't in error. Bond on writ of error. Evarts, Southmayd & Choate, att'ys for pl'ff in error.

110 The within bond is approved.

SAM'L BLATCHFORD.

Filed Oct. 4, 1872.

111 UNITED STATES OF AMERICA, *ss:*

To JAMES FOGARTY, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the first Monday of December next, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the southern district of New York, in the second circuit, wherein the Great Western Insurance Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the honorable Samuel Blatchford, one of the judges of the said circuit court of the United States, this 3d day of October, in the year of our Lord one thousand eight hundred and seventy two.

SAM'L BLATCHFORD.

(Indorsed:) United States Supreme Court. The Great Western Insurance Company, pl'ff in error, against James Fogarty, def't in error. Citation. Evarts, Southmayd & Choate, attorneys for pl'ff in error.
Due & timely service of within citation is hereby admitted.
New York, October 4, 1872.

OWEN, NASH & GRAY,
Pl'ff's Att'ys.

Filed Oct. 4, '72.

(Indorsement on cover:) No. 304. The Great Western Insurance Company, plaintiff in error, vs. James Fogarty. S. New York C. C. U. S. Filed 2d December, 1872.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

The Great Western Insurance Company, Plaintiff in Error, *vs.* James Fogarty, Defendant in Error.	No. 304.

STATEMENT.

The plaintiff in error was sued upon a policy of insurance issued to one Ysquierdo, "on account of whom it may concern," the plaintiff below alleging and proving the insurance to have been made on his account.

The policy was an open one, and the application for the endorsement thereon of this risk, requested insurance of "$2,250 on machinery shipped by Watts, Campbell & Co.," "on board the bark *Ella Adele*, at and from New York to Havana," "free from particular

average." The endorsement of the risk, in pursuance of the application, gives the description of the goods insured as "machinery free from particular average." The "*memorandum*" clause of the policy provides that "machines and machinery of every description," "are warranted by the assured free from average, unless general."

Rec., fols. 49, 103–104.

Upon the plaintiff's proofs, it appeared that the bark *Ella Adele* was entering the port of Havana, October 23, 1867, when she was struck by a sudden squall, which drove her ashore upon the rocks, close to the Punta Battery, and only a mile distant from the place where her cargo would have been delivered in completion of the voyage. The bark bilged, the sea made a clean breach over her, and, ultimately, she was broken up, and went to pieces where she was stranded.

Rec., fols. 52–53, 41.

The machinery insured consisted of "eight pieces and eight boxes of machinery," as described in the bill of lading, and constituted the parts of a complete "sugar-packing machine," with its necessary "truck irons," and three extra truck irons, intended for machines which had been shipped to Havana the year before.

Rec., fols. 25, 33.

The plaintiff himself was at Havana when the bark arrived, and heard of the stranding of the bark on the day it took place, and, knowing his machinery was on board, went down to the vessel. Mr. Tyng, agent for the underwriters, went to work to save the cargo, and placed this machinery at the disposal of the plaintiff, both on the beach as it was taken from the wreck and after it was stored in a warehouse. The plaintiff examined the machinery while it was being recovered, and when it was in the warehouse. The expense of

salvage of the machinery and of transportation to the warehouse and one month's storage was but $60. No abandonment to the underwriters was made by the assured.

Rec., fols. 22–24, 26, 40–41.

It appeared that the machinery was rusted by sea-water, and that parts of it were lost, and that they could not be supplied nor the machinery restored short of the shop of manufacture in the United States. About two-thirds in bulk of the machinery was recovered from the wreck and stored in Havana. The parts lost were principally the small pieces.

The evidence tended to show that the injury by rust required the parts injured to be re-turned, and this would reduce the dimensions of these parts and unfit them for the adapted parts, should they be supplied, and it was claimed that this showed an actual loss of the subject insured, within the meaning of the policy, and notwithstanding the warranty of the policy, in the "memorandum" clause (Rec. page 41), that "machines and machinery of every description" "are warranted by the assured free from average unless general," and notwithstanding the special description of this risk as on "machinery free from particular average" (Rec., fol. 104).

The nature of the damage to the subject insured is given in detail by the plaintiff himself, by his engineer, by the agent of the underwriters, and by one of the manufacturers. The substance of it is, that the greater part of the machinery was delivered in a damaged condition at Havana, the port of destination, and that thus damaged, and for want of the missing parts, it was not serviceable as a working machine, and could not be made so at Havana, nor in the United States except at an expense approaching that of a new machine.

Fogarty's evidence, fols. 24–32.
Tyng's evidence, fols. 41–44.
McClellen's evidence, fols. 45–46.
Watts' evidence, fol. 47.

EXCEPTIONS.

When the plaintiff rested, the defendant requested the judge to direct a verdict for the defendant on the grounds—

1st. That the insurance of the plaintiff's machinery being, by the terms of the insurance, "free from particular average," and a portion of the machinery having been saved and arrived at the port of destination, the loss was not total. and the defendants are not liable therefor within the terms of the policy.

2d. That the evidence on the part of the plaintiff will not sustain a finding by the jury that the loss was total.

The court refused this direction to the jury, and the defendant's counsel excepted to such refusal.

Rec., fol. 48.

When the evidence on both sides was all in, the defendant renewed this request which was again refused, and the refusal again excepted to.

Rec. fol. 55.

The defendant then requested the court to charge the jury.

I.—That upon the evidence the defendant was entitled to a verdict, and that they should so find.

II.—That the defendants would be liable under the policy only for an actual loss of the subject insured, and not for the constructive total less thereof.

III.—That if the jury find that a large or any considerable part of the articles insured and shipped were saved and arrived at the port of destination, the loss

was not total, and the defendants having only insured the goods "free from particular average," are entitled to a verdict.

IV.—That if any portion of the machinery insured and shipped in the eight boxes mentioned in the invoice and bill of lading arrived in specie at the port of destination, the loss was not total, and the defendants are not liable under the policy.

V.—That if the operation of the perils of the sea upon the machinery did not alter its nature or character, but if any part of it, though damaged thereby, arrived at the port of destination at all in the form of pieces or parts of machinery of the character shipped, the loss was not total, and the defendants are not liable under the policy.

VI.—That there is no sufficient evidence to sustain a finding on their part that no piece of the machinery shipped arrived at the port of destination as a piece of machinery, or in the condition in which it was shipped.

VII.—That for damage from sea perils or other perils enumerated in the policy which happened on the voyage to the machinery insured, or any part thereof, but which did not result in its total destruction and prevent the arrival of any part at the port of destination, the defendants are not liable under the policy.

The court refused to charge as requested in any of these propositions, and to each such refusal the defendant excepted.

Rec., fols. 55–56.

The court then charged the jury as follows:

"That the meaning of the term 'free from particular

average' used in the policy, was that the defendants should be liable only for a total loss of the subject insured; that the subject insured was not machines but machinery, by which is generally understood the several parts or portions of machines, adapted and fitted to be put together so as to constitute a machine (in this case a sugar-packing machine); and applying the rule of law as to what constitutes a total loss to this particular subject insured, the jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition, so that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition; in that case the plaintiffs could not recover, as the loss would not be total; but that if every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use on being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured as machinery, although the material itself might still exist; and if they so found, they would find a verdict for the plaintiff for the sum named in the policy, with interest from the tenth day of September, 1868."

And thereupon the defendant's counsel excepted to the following portions of the charge separately and specifically:

To the charge that the subject insured was not machines but machinery, by which is generally understood the several parts or portions of machines, adapted and fitted to be put together so as to constitute a machine (in this case a sugar-packing machine).

To the charge that the jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition, so that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition.

To the charge that if every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use, *on* being supplied with its corre-

sponding or connecting pieces, then there was a total loss of the subject insured as machinery, although the material itself might still exist.

To the charge that if they found that every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use, on being supplied with its corresponding or connecting pieces, although the material itself might still exist, they would find a verdict for the plaintiff for the sum named in the policy, with interest from the tenth day of September, 1868.

The jury found a verdict for the plaintiff for the full amount insured as for a total loss.

Assignment of Errors.

The only errors are raised by the exceptions to the refusals of the court to direct the jury as requested, and to the actual directions given to the jury and excepted to by the defendant.

POINTS.

First Point.—The motives and reasons of the contract between the assured and the underwriters, which required the warranty of "memorandum" articles "free from average," or claim for partial loss, as a *condition* of the insurance, are well understood.

It is competent for the contracting parties to shape the stipulation and adjust the premium, in respect to this element of the contract, and their agreement, as rightly construed, binds them to its consequences.

2 Arn. Ins., 851–2.

Second Point.—The meaning of this warranty, and its efficiency to protect the underwriters from any claim for loss, less than total, which has happened to the "memorandum" articles from the perils insured against, are well settled, and upon the best reason and the highest authority.

"In point of fact, therefore, an insurance upon the articles warranted free of average in the clause, is equivalent to an insurance against their *total loss only*, according to the meaning of that term as explained in the chapter that treats of it."

2 Arn. Ins., 854.

The English cases admit, in certain special predicaments of the cargo *at ports of distress*, which make a constructive total loss of *non-memorandum* articles, that a constructive total loss of "memorandum" articles may also be allowed.

2 Arn. Ins., 1124.

But, as Mr. Arnould says, "it is different in the United States, *where there can be no constructive total loss on memorandum articles*," *ut supra*.

This court, by Story, J. says: "It seems, therefore, to be the settled doctrine that nothing short of a total extinction, either physical or in value, of memorandum articles at an intermediate port would entitle the insured to turn the case into a total loss, when the voyage is capable of being performed. And perhaps even as to an extinction in value, where the commodity specifically remains, it may be deemed not quite settled whether, under the like circumstances, it would authorize an abandonment for a total loss.

Marcardier *vs.* Ches. Ins. Co., 8 Cranch, 47.

Third Point.—An important question arising on the construction of this warranty upon facts showing a *total actual loss of part of the memorandum articles* by perils insured against, has been settled in maintenance of the exemption of the underwriters even from *this* form of claim for partial loss under this warranty.

This was held, in the case of the total loss in the sea, beyond recovery, of a portion of a cargo of hides by a peril insured against.

By this court, in

Biays *vs.* Ches. Ins. Co., 7 Cranch, 415.

By Court of Errors of New York, in

Wadsworth *vs.* Pac. Ins. Co., 4 Wend., 33.

The English rule admits the recovery for an actual total loss of a part of the memorandum article.

Davy *vs.* Milford, 15 East., 559.

Fourth Point.—The English practice of insurance has yielded to the argument that, when the extreme and definite catastrophe of *stranding of the vessel* by sea perils has happened to the whole adventure, damage to memorandum articles should be recovered for as a partial loss.

This result is effected by adding to the warranty clause, in English policies, "free from average, unless general," the words "*or the ship be stranded.*"

2 Arn. Ins., 852, 857.

This limitation of the warranty has not been adopted in the United States, and the experience of the English courts in construing and enforcing it, does not favor it.

2 Arn. Ins., 860.

Fifth Point.—Upon the principal question of *deterioration*, in substance or value of the memorandum articles by the perils insured against, exhibiting itself at an intermediate port of distress, as affecting the operation of this warranty, and permitting or excluding a recovery for a total loss, the doctrines of this court, and of the courts of New York (*lex loci contractus*), are explicit and maintain the warranty in its full integrity.

Marcardier *vs.* Che . Ins. Co., 8 Cranch, 47 (*ut supra*).

"All considerations connected with the loss of the cargo, in respect to quantity or value, may at once be dismissed from the case. As to memor ndum articles, the insurer agrees to pay for a total loss only, the insured taking upon himself all partial losses without exception. If the property arrive at the port of discharge reduced in quantity or value to any amount, the loss cannot be said to be total in reality, and the insured cannot treat as total and demand an indemnity for a partial loss."

Moreau *vs.* U. S. Ins. Co., 1 Wheat., 223.

In Hugg *vs.* Augusta Ins. Co., Mr. Justice Nelson, delivering the opinion of this court, reviews the doctrine of the English and American cases, and gives the conclusions of the court as follows:

"What constitutes a total loss of a memorandum article has been the subject of frequent discussion, both in the courts of England and in this country, and in the former of some diversity of opinion; but in most of the cases the decisions have been uniform, and the principle governing the question regarded as settled; and that is, so

long as the goods have not lost their original character, but remain in specie, and in that condition are capable of being shipped to the destined port, there cannot be a total loss of the article, whatever may be the extent of the damage, so as to subject the underwriter. The loss is but partial."

"The only doubt that has been expressed in respect to the soundness of this rule is, whether a destruction in value for all the purposes of the adventure, so that the objects of the voyage were no longer worth pursuing, should not be regarded as a total loss within the memorandum clause, as well as a destruction in specie. But although this has been suggested in several cases in England as a proper qualification and as coming within the obligation of the underwriter, there is no case to be found in which the suggestion has received the sanction of judicial authority."

"In this country the rule has been uniform that there must be a destruction of the article in specie, as will be seen by a reference to the following authorities:

"In respect to the first point, therefore, the court direct that it be certified to the circuit that if the jury find that the jerked beef was a perishable article within the meaning of the policy, the defendant is not liable as for a total loss of the freight, unless it appears that there was a destruction in specie of the entire cargo, so that it had lost its original character at Nassau, the port of distress, or that a total destruction would have been inevitable from the damage received if it had been reshipped before it could have arrived at Matanzas, the port of destination.

The Court of Appeals of New York says:

"The law of this State is settled, that there can be no recovery in case of loss of memorandum articles, when any portion thereof arrives in specie at the port of destination, *although possessing no value there.*"

As to memorandum articles, whose condition at the port of distress makes their transportation to the port of destination "*impossible*," the New York court adopts the doctrine of this court in Hugg *vs.* Augusta Ins. Co., *ut supra.*

De l'eyster *vs.* Sun Mut. Ins. Co., 19, N. Y., 277.

In a late case in New York, before the Commission of Appeals, the whole doctrine and all the cases, English and American, are ably reviewed by eminent counsel and by the learned court.

The court held, where memorandum cargo, to wit, coffee worth $27,000, bound to New York, was involved in total wreck of the ship near Cape May, and itself submerged, and while in this condition was abandoned to the underwriters, that the recovery, by wreckers employed, weeks afterwards, by the shipowners, at sixty per cent. salvage, of some of the coffee "swollen by sea water and discolored," and taken out of the sea "by means of a dipper fixed to a hook at the end of a long pole," and on sale producing "*two dollars and forty-four cents.* over the auctioner's charges," did not convert the loss into a partial loss from its character of total, at the time the abandonment was made.

But in this extreme case of reduction in quantity and value, and real mutation of species, considered as an article of food, the court puts it upon the totality of the actual loss, at the time of abandonment, as follows:

"The jury have found that this effort to recover the cargo was a contrivance simply to convert into a partial what would otherwise be a total loss. In my view of the case, the loss of the coffee was total, and the right to recover became fixed when the abandonment was made. The rescue of a portion of the contents of the vessel, with whatever motive it was done, did not undo what was already done. It could not convert into a partial loss, that which, under the circumstances detailed, the law adjudged to be total."

HUNT, Commr.

Wallerstein *vs.* Col. Ins. Co., 44 N. Y., p. 223.

Sixth Point.—Due attention to the varied and comprehensive list of articles embraced in the memorandum clause will exhibit, in its true light, the vital importance of the warranty insisted upon by the underwriter, and conceded by the assured. Different considerations suggest the adoption of this or that article for the operation of the warranty, but they all turn upon some trait in the nature of the article which involves risks, or measures of risk to it, *of depreciation in the course of sea-transportation, without extraordinary misfortune, or disproportionate injury from misfortune,* which no adjustment of premium can justify the underwriter in assuming.

These traits sometimes have relation to the article as perishable *in its substance*, and sometimes *in its value ;* sometimes because of the delicacy of the fabric, sometimes because of its complication, whereby slight injury involves destruction of value, though the substance remains; or the loss of part, trivial in bulk, breaks the combination of parts,

upon which the marketable value of the whole depends.

It is easy to see, upon the evidence, that the memorandum article which constituted the subject of this marine risk, possessed several qualities which concurred to preclude its insurance against anything but total loss.

I.—It was a *patented* machine, of which a considerable part of its market value came from neither cost of material nor of manufacture, but from the invention and monopoly. *This* ingredient of value, manifestly, was inseparable from the entirety of the subject as a perfect and working machine, and could not be divided between the parts lost or injured, and the parts saved or sound.

II.—This machinery, from the mutual dependence of the parts, was exposed to a loss of the main *value* of the whole, from a loss *in substance* of a small part, important in connection, but trivial in bulk or value.

III.—Similar disproportion of injury to the *whole*, from trivial deterioration of parts by rust, was another quality of this machinery, which precluded any possible adjustment of premium to cover any loss except total.

IV.—The measure of the underwriter's pecuniary liability, from partial loss in substance, or partial depreciation in value, of *machinery*, must, manifestly, greatly depend upon the market of destination. Damaged machinery may be saleable where it can be restored or utilized, as in Europe or the United States, and be valueless in Africa or Cuba.

But these calculations form no part of the

adjustment of premium and risk in the business of marine insurance. The underwriter's computations are pecuniary, entirely, of *premium as the purchaser of safety of the subject insured under the risks to be encountered.*

If the nature of the article insured precludes a *pro rata* computation of partial losses—that is to say, if loss of part, either in substance or soundness, will produce a total or disproportionate loss in value of the whole—partial losses must be excluded from the risk, *as not commensurable with any premium.*

Seventh Point. — Upon these unquestionable reasons, and upon the firm and uniform decisions of the courts (and pre-eminently of this court), the doctrine of the memorandum warranty is conclusively and unequivocally established.

As to the facts, for the application of this doctrine, it is manifest upon the proofs at the trial :

I.—That two-thirds of the machinery insured arrived at the port of destination, was landed and stored, and at the disposition of the assured, who was there to act upon his interest.

II.—That from the stranding of the vessel to the landing and storing of the cargo, the assured was cognizant of, and attentive to, all that took place, and made, or attempted to make, no abandonment.

III.—That the shape and extent of the loss by sea peril was,

(*a.*) The actual loss of part of the machinery by irrecoverable submersion in the sea.

(*b.*) By deterioration of the parts landed, by *rust*, which operated upon the value of the parts saved as *machinery* rather than as material.

Eighth Point.—This state of facts entitled the defendant below to the instructions asked for, and in their refusal, and in the actual charge of the court, there is manifest error.

I.—Upon the mere fact of the arrival at the port of destination, *in specie*, of two-thirds of the machinery, no matter what its condition, total loss of the subject insured was not predicable of the catastrophe in a legal sense any more than in a natural sense.

The defendant was, thereupon, entitled to a verdict.

II.—It is clear, upon the authorities, that the actual total loss of a part of the subject insured did not justify a recovery for the part so lost. Nor did the court so hold.

III.—It is clear that if the whole of the subject insured had been landed with every part so deteriorated by rust as to be valueless as a working or reparable machine, that no recovery for total loss could have been had.

IV.—Yet, out of the combination of these two forms of loss, to wit, actual total loss of parts of the machine, and rust of the parts saved, so

that *if the parts lost had been saved uninjured*, the rust of the parts so injured would have defeated the combination between them and the uninjured parts, as a working or reparable machine, the court makes out a total loss of the machinery.

V.—Now, the most that can be made out of this charge in *principle* is, that if the whole of this machinery had arrived and been landed, and parts were uninjured and parts were so damaged as to be entirely unfit for use when combined with the uninjured parts, then there would be a total loss within the policy.

What is this but to hold the underwriter to an undertaking, notwithstanding a warranty against partial injury, that the subject insured, arriving and landed, should maintain its character of machinery in condition to work as such ?

Ninth Point.—The case of Judah *vs.* Randal (2 Cai. cases, 324) is no authority for the plaintiff below, nor does the charge of the court pursue the proposition of that case.

The court there held, on an insurance of a chariot, free from average, where the box of the carriage was jettisoned, and was two-thirds of the value of the chariot, that the assured was entitled to abandon and sue for a total loss.

The court says :

" The part lost exceeded more than half the value of the *whole* chariot, the *thing* insured. The box being lost, the chariot cannot with any propriety be considered to have arrived in specie, as that it required to be repaired only to have again become a *whole* chariot."

In the case at bar, the insurance was not upon *a machine*, but upon *so many boxes and pieces of machinery*.

Besides, here there was no abandonment.

But this case is in no ways consistent with the settled doctrine of the later cases in New York, and of all the cases in this court.

The case of Wallerstein *vs.* Col. Ins. Co. (*ut supra*), so far from being an authority for the plaintiff below, in the severity of its exactions, as the conditions of possible recovery for total loss of a memorandum article, discards the doctrine of the learned court below.

The principle of that case is that an actual total loss cannot be converted into a partial loss by a colorable salvage. *De minimis non curat lex.*

Last Point.—The judgment should be reversed and a new trial ordered.

EVARTS, SOUTHMAYD & CHOATE,
Attorneys.

WM. M. EVARTS,
Of Counsel for Plff. in Error.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty, N. Y.

Supreme Court

OF THE UNITED STATES.

James Fogarty,
Defendant in Error,

ads.

The Great Western Insurance Company,
Plaintiffs in Error.

} Points of Defendant in Error.

This is a writ of error to the Circuit Court of the Southern District of New York.

James Fogarty, the defendant in error, was plaintiff below, and sued the Great Western Insurance Company upon a policy of marine insurance upon cargo.

The policy was an open one (*pp.* 38–42), the insurance being effected by the entry under date of Sept. 26, 1867, for a voyage by the *Ella Adele*, from New York to Havana, by the description "machinery free from particular average" (*p.* 42, *fol.* 104).

The question in the case was, whether under this description the loss was a total loss.

The vessel sailed from New York, and on the 23d October, 1867, just before reaching the harbor of Havana, in a violent squall, drove upon the rocks, "striking very heavily, and immediately bilging." She thumped all night, and on the following morning, being full of water, began to break up, was deserted by the master and crew and subsequently became a complete wreck (*Protest*, *p.* 20; *Tyng*, *p.* 15).

The agent of the underwriters at Havana took possession, and from time to time, for about a month, was engaged in raising cargo.

The machinery insured by plaintiff consisted of the pieces necessary for one complete sugar-packing machine, including, as part of it, three sets of truck-irons, and also of three extra truck-irons (*p.* 9), being described in the bill of lading and invoice as eight pieces and eight boxes "composing one sugar-packer and three trucks" (*p.* 19).

About one-half, in weight, of the metal was recovered by the underwriters, and tendered to the assured, who refused to receive it. It was all so rusted as to be only fit to be melted over as old iron—utterly worthless as machinery. The defendants below put in evidence the inventory of the pieces, showing what were lost and what recovered in a damaged state. The value as old iron of what was saved was about $50; the value of the machinery, as insured, was $2,250 (*pp.* 12, 13).

The testimony showed that all the pieces saved were so rusted that they could not be used in a machine. The axles would have to be re-turned, which would make them too small for the journals, and all the pieces which fitted to other pieces, if properly smoothed and polished, would not fit (*p.* 10, *fol.* 20, 21).

The testimony on this point was uncontradicted, consisting of that of the plaintiff below (*pp.* 7–14), of Tyng, the agent of the underwriters (*p.* 15), of McClellan, a machinist in Cuba (*p.* 16), and of Watts, who built the machine in Newark, and saw the damaged pieces in Havana (*p.* 17).

The exceptions now before the court were raised upon the refusal of the court below to direct a verdict for the defendants, and upon the requests to charge, and the charge as made (*pp.* 18, 20, 21).

The court charged that under the policy, the defendants below were "liable only for a total loss of the subject insured; that the subject insured was not machines, but machinery, by which is generally understood the several parts or portions of machines, adapted and fitted to be put together, so as to constitute a machine (in this case, a sugar-packing machine); and applying the rule of law as to what constitutes a total loss to this particular subject insured, the jury will find whether any piece or portion of the machinery insured arrived at its destination in a perfect condition, so that it could have been used with its corresponding or connecting pieces, had they also arrived in good condition; in that case, the plaintiff could not recover, as the loss would not be total; but that if every pieee of the machinery was so damaged by the perils insured against, as to be entirely unfit for use, on being supplied with its corresponding or connecting pieces, then there was a total loss of the subject insured as machinery, though the material itself might exist" (*pp.* 21, 22).

Under this charge the jury found for the plaintiff below.

The proposition of the plaintiff in error was that if any portion of the machinery "arrived *in specie* at the port of destination," the loss was not total (*p.* 21, *fol.* 55), and again, that if any part of the machinery, however damaged, "arrived at the port of destination at all *in the form* of pieces or parts of machinery of the character shipped, the loss was not total" (*id.*)

These two requests present the point in controversy, the others being too general to raise the precise question at issue.

If the recovery by the underwriters and tender to the assured of a single screw, wheel, crank or other article

of the property insured, retaining still *the form* of a screw, wheel or crank, and in that sense only recovered *in specie*, though in fact destroyed as an available screw, wheel or crank in the "machinery" insured, prevented the loss from being total, then and not otherwise is there error in the direction.

I.—The property insured was not so many screws, wheels, axles, cranks, &c. Had such been the description, the contention of the plaintiffs in error would be colorable.

But the description was "machinery."

Suppose a risk on a box of "musical instruments," which is one of the articles enumerated in the memorandum as warranted free from average unless general (p. 41), and they went down with the ship, but were recovered, and tendered as so much old brass or parts of flutes, utterly worthless as musical instruments, would not the loss be total.

The point to be determined in cases of this kind is whether the loss is one of particular or general average—in other words, one of damage simply, or of total loss.

No case has gone so far as to hold that there must be either a total resolution into other elements of the material of the subject insured, or an absolute impossibility of recovering the subject from the bottom of the sea.

And the words *in specie* do not exhaust the modes of determining the question, but have simply been adopted as fit words to test particular subjects.

Thus fish though spoiled may still be fish (*Cocking* v. *Frazer*, *Park Ins.*, 551); corn which is putrid still be corn (*Neilson* v. *Col. Ins.*

Co., 3 *Caines*, 108); pork that is roasted still be pork (*Skinner* v. *West. M. & F. Ins. Co.*, 19 *La.*, 273); hides that are tainted still be hides (*Depeyster* v. *Sun Mut. Ins. Co.*, 19 *N. Y.*, 272); but a wheel that was melted would hardly be a wheel; a crank fished up from a wreck would hardly be a sewing-machine; a key-board saved would not be a piano, nor is a lot of rusted, broken and twisted pieces of old iron, machinery in any proper sense of the word.

If the property had been insured as a sugar packing machine, there could of course be no answer to the claim for a total loss. *Judah* v. *Randal*, 2 *Caines' Cas.*, 324, would have been entirely in point. There a chariot was insured; the box was lost, but the wheels were saved; but it was held that the loss was total, because wheels alone do not make a chariot.

In the case at bar the court considered that mere isolated screws and wheels did not make machinery, but that machinery meant the various parts fitted and adapted to be put together.

Worcester defines machinery to be "mechanical combinations of parts for creating or for applying power in engines or machines. The works of a machine."

Some of the articles used in a machine may answer for various kinds of machinery, as screws, bolts, and the like, but one who had bought a lot of screws or bolts, would hardly call the lot machinery.

Machinery supposes some particular engine or construction to have been planned, in reference to which the various parts have been adapted to each other; a piston to some cylinder, an axle to some journal, a crank to some rotary movement. And if the substantial portions of the arrangement have been destroyed what is left is certainly not a machine, "an artificial work which serves to apply or regulate moving power, a piece of mechan-

ism."—(*Worcester.*) And if no one part has its connecting part, it is not machinery; certainly not if no one part is in such a condition as to be fit to put into a machine.

The defendant in error contends that where the property has been in fact lost by a peril insured against, and cannot be recovered in a condition answering the character by which it was insured, and what is recovered is substantially worthless in any character, the loss is total.

In this case the vessel went to pieces, and the machinery lay at the bottom of the ocean. Pieces of it were recovered by the underwriters in the course of a month, but these pieces were worthless as machinery—worth nothing, except as old iron. As old iron they were worth perhaps fifty dollars (*p.* 12, *fol.* 35); their proprtion of the salvage was sixty (*p.* 16, *fol.* 42)

The court below, therefore, went as far in their favor as the plaintiffs in error could in reason claim, when it gave the instruction that only in case every piece of the machinery was so damaged by the perils insured against as to be entirely unfit for use, on being supplied with its corresponding or connecting pieces, was there a total loss (*p.* 21, *fol.* 57).

II.—It is not necessary to consider whether the language of some of the earlier cases has not been strained too far when it has been pressed into the support of the doctrine, that if any particle of the property insured arrives by any means at the port of destination in a recognizable shape, the loss ceases to be total. In *Wallerstein* v. *The Col. Ins. Co.* (44 *N. Y. Rep.*, 204), the underwriters sought to escape liability for an insurance on coffee

by fishing up a few grains from the wreck; and though the lower courts deemed themselves bound by authority to sustain the defense against "common sense and common justice," the Court of Appeals held that an actual, total, physical loss was not necessary, but that a substantial destruction of all value made the loss total within the warranty against particular average.

But in the case at bar the court below intended to follow the rule as laid down in this court in *Mereau* v. *The U. S. Ins. Co.*, 1 *Wh.*, 219, and *Hugg* v. *The Augusta Ins. and Banking Co.*, 7 *How.*, 595.

In this last case the policy was on freight, the cargo being jerked beef. The vessel was badly damaged, but was able to reach her destination, but not able to bring home the cargo—nor were other vessels obtainable. The cargo, though damaged, was sold, and brought a considerable sum.

It is said, in the opinion, that in order to a total loss "there must be a destruction of the article in specie;" but it is also said, as though the expression were equivalent, that "so long as the goods have not lost their original character," the loss is not total. The expressions are not statutory, but merely modes of saying that mere deterioration or damage is not sufficient, however extensive, if the property insured, retaining still its identity and character, is delivered at its destination.

On the second trial of the last case cited, Ch. J. Taney instructed the jury that the loss was total if the goods were "so much damaged as to be incapable of reaching their destination in their original character."

Hugg v. *The Augusta, &c., Co., Taney,* 159.

III.—The court below did not disregard the true meaning of the rule as maintained in this court. The only question is whether it was properly applied, in the particular case, which differs from those in which the rule has been discussed, both in the character of the property and the terms of its description. The rule could not have been strained to the extent claimed by the plaintiffs in error without leading to absurd consequences. The practical question was, whether any substantial part of the property retained the character it had when insured, and this question was correctly determined.

IV.—The judgment below should be affirmed.

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